ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

Vol. 15, No 2 **Spring 2006**

CHAIR'S CORNER
By Michael S. Wilk, Chair, ADR Section

Michael S. Wilk

My chairmanship of the ADR Section will come to an end at the Section's annual meeting, which will take place in Austin on June 16, 2006, during the State Bar of Texas annual meeting. The year has gone by faster than I expected. Although it was a quiet year, we successfully addressed all of the items on our agenda. Now we are looking forward to the annual meeting and planning for next year. The nominations for the Section's council and officers have been made, and elections will be held at the Section's annual meeting. John Fleming, the Chair Elect for next year, has planned an interesting CLE program for the annual meeting. Please refer to the articles in this newsletter that list names and qualifications of the nominees and outline the CLE program. We will also present the Evans Award at the annual meeting. I hope that you will attend.

The work or our section includes providing financial help to programs dealing with ADR and to those in need. At our last meeting, the council approved two grants totaling approximately $2,300.00. One grant was to the Graduate Portfolio Program in Dispute Resolution at the University Of Texas School Of Law to help sponsor and pay for expenses of its 2006 Spring Symposium. The Symposium is a culmination of the work of graduate students from law school and other graduate programs. The second grant was made to the University of Texas at Arlington to assist four students participate in the VIS Arbitration Moot Court in Vienna, Austria. The team is the first from the United States composed of non-law students, all of whom have expressed interest in attending law school and practicing international arbitration. Earlier in the year, the Section contributed $1,000.00 to the Texas Equal Access to Justice Commission to assist people in the wake of Hurricane Katrina and Hurricane Rita. We are proud to be able to give this assistance.

I call your attention to the article on page 9 of this newsletter reporting on changes that the TMCA has adopted in the continuing-education requirements for credentialing. The TMCA board of directors adopted the new requirements in response to the concerns expressed by individual credential holders, potential credential holders, the ADR section, and other organizations occupying a seat on the TMCA board. We appreciate the tireless effort that the TMCA board has made in securing for mediators in Texas a system of self-governance. We express our thanks to the responsiveness of the TMCA board and urge all mediators practicing in Texas to become credentialed to help insure that mediators in Texas will continue to have the advantages that the TMCA affords.

The amendment would provide that for matters subject to the Federal Arbitration Act, appeals may be made from orders, including interlocutory orders, of Texas courts to the same extent that such appeals are permitted under the Federal Arbitration Act. This amendment would eliminate the duplication that

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Inside this issue:

COUNCIL ESTABLISHES LEADERSHIP SLATE

The ADR Section Council has approved a slate of officers and new Council members to lead the Section in the 2006-2007 bar year. At its April 8, 2006 meeting in Dallas, the Council approved the Nominating Committee's proposed slate of officers, which includes Cecilia H. Morgan for Chair-elect, Jeff Kilgore for Secretary, and John K. Boyce, III as Treasurer. This year's Chair-elect, John Fleming, will automatically succeed Michael S. Wilk as Chair of the Section, and Mike will remain on the Council for another year as Immediate Past Chair.

Cecilia Morgan, nominated for Chair-elect, is one of the most highly regarded mediators and arbitrators working in the Dallas office of JAMS. She is not only a student of ADR – she teaches it as well. Cecilia came to the Council in 2003 to fill an unexpired term and was elected in 2004 to a full three-year term. She has served as Treasurer for the past two years.

A lawyer with over thirty years of experience, Jeff Kilgore has devoted most of his time for the last decade to mediation and arbitration in Galveston. Jeff has been an active leader of several bar, ADR, and civic organizations, and he has been on the Council for nearly two years.

An attorney since 1978, who now devotes most of his practice to mediation and arbitration, John Boyce, III has recently revised the *ADR Texas Style* pamphlet for the Section, a publication that the State Bar of Texas has distributed to the public for many years. He has also produced an informational pamphlet on consumer arbitration that was described in the last edition of *Alternative Resolutions*.

John Fleming, who has been on the Council since 2002, has been the Section's eyes and ears at the state legislature for the past two sessions. A master of the legislative process and an experienced mediator and arbitrator, John is general counsel at the Texas Savings and Loan Department in Austin.

Michael S. Wilk will continue on the Council for another year as Immediate Past Chair. He is President of Hirsch & Westheimer, a Houston law firm that he joined fresh out of the University of Texas School of Law in 1966. After many years as a business lawyer and litigator, Mike's interest turned to ADR in 1991, and he has been a leader in that field ever since. He is a past President of the Association of Attorney-Mediators, and he has actively served Harris County's DRC as well as its Peer Mediation program. Michael served as Treasurer and as Chair-elect before becoming Chair.

The Council has also approved the nomination of four new members of the Council. If elected at the ADR Section's annual meeting to be held on June 16 in Austin, these individuals will serve three-year terms ending in June 2009. They are Lynne M. Gomez of Bellaire (near Houston), Reed Leverton of El Paso, John Allen Chalk of Fort Worth, and Kris Donley of Austin, who will be our "public" member.

Reed Leverton is a full-time mediator and arbitrator, having formed W. Reed Leverton, P.C. on January 1, 2001. He was recognized as "Mediator of the Year" by the El Paso Bar Association in 2003-2004, and he currently lectures in Dispute Resolution skills at UTEP.

An attorney since 1973 and a minister of the Churches of Christ since 1956, John Allen Chalk is not only an accomplished attorney, but also a distinguished mediator and arbitrator. His practice is international, including London, Switzerland, and the Republic of Kazakhstan.

Kris Donley is Executive Director of the DRC in Austin, and her many strengths include family mediation and public-interest, multi-party facilitations. She is an adjunct faculty member and guest lecturer nationally and internationally.

Lynne Gomez clerked for Hon. Woodrow Seals in Houston before starting a top-notch labor and employment law career. She has been a full-time neutral since 2001, mediating employment and commercial disputes and arbitrating virtually every type of employment dispute.

The ADR Section Council bids a fond farewell to five individuals whose tenures on the Council end in June. Claudia Dixon and Kathy Fragnoli of Dallas, Josefina Rendón of Houston, and Walter Wright of San Marcos have been valued members of the Council since 2003. Walter has agreed to remain as Editor of the ADR Section's newsletter. Bill Lemons will end six years of service to the Section in June. Elected to the Council in 2000, Bill served two terms as Treasurer, then Chair-elect, Chair, and now Immediate Past Chair.

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I do not want the peace that passeth understanding. I want the understanding which bringeth peace.

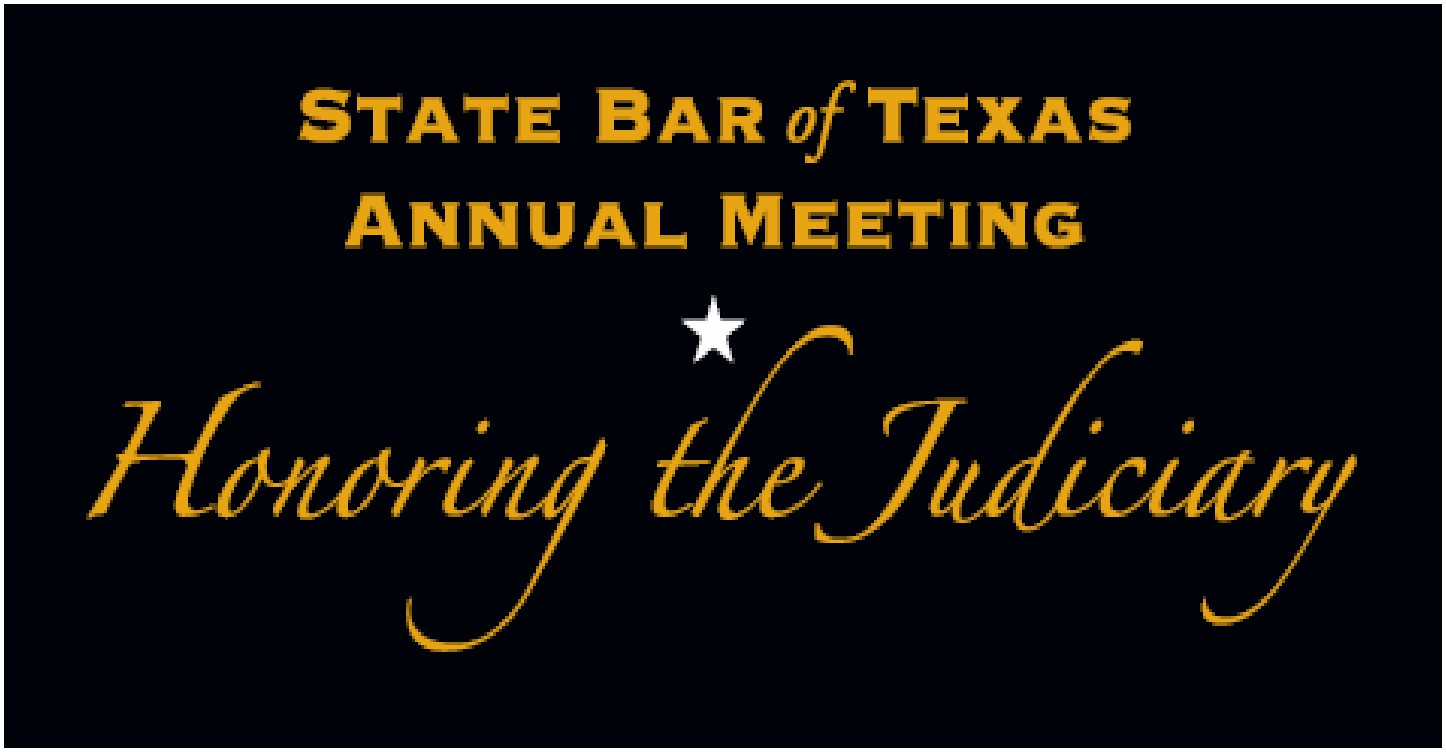
Helen Keller

NOTICE OF ANNUAL MEETING OF ALTERNATIVE DISPUTE RESOLUTION SECTION

The Annual Meeting of the Alternative Dispute Resolution Section (the Section) of the State Bar of Texas (SBOT) is scheduled for 10:00 A.M. on Friday, June 16, 2006, in Austin, Texas. The purpose of the meeting, which will take place in conjunction with the SBOT's annual meeting, will be to conduct the Section's business, including the election of new Council members and officers. The Section's luncheon begins at 11:30 A.M. ($35.00 ticket required). During the luncheon, Michael Wilk will recognize outgoing officers and Council members, and Bill Lemons will present the Evans Award for outstanding service to the Texas ADR community.

Following the luncheon, the Section will kick off a year-long "20th Birthday Celebration" of the Texas Alternative Dispute Resolution Procedures Act that was enacted in 1987, with a panel composed of Professor Alan Rau and mediators, litigators, and federal and state judges. The title of the program is "How Has ADR Changed the Practice of Law?" The panel will provide a retrospective on the paper about the "multi-door courthouse" that Frank Sanders presented at the 1976 Pound Conference, and it will discuss the impact of ADR on our court system and our society at large. A case-law update and update on statutory developments will also be included.

We hope to see you there. Mark your calendars and plan to attend.



WHAT DO YOU THINK ABOUT THE NEWSLETTER'S FACELIFT?

By Robyn Pietsch and Walter A. Wright

We hope that you noticed some changes in this issue of the newsletter. There are more photos and colors, and we asked our printer to punch holes in the side of the newsletter so you can begin saving copies in binders. We made all of these changes because you suggested them.

Two authors have volunteered to begin writing new columns for the newsletter. Sherrie Abney will write (or find authors for) a new column on Collaborative Law. If you have a suggestion for an article about Collaborative Law, please contact Sherrie at SAbney913@aol.com. Kay Elliott will write a column entitled "Reflections from the Edge." Kay's column will review the latest research and literature in the interdisciplinary field of dispute resolution and explore possible applications of the research and literature to everyday practice. Sherrie and Kay's first articles are in this issue of the newsletter.

We will continue to offer the column about ADR on the Web (by Mary Thompson), and we will publish more articles about ADR programs in other countries (from authors around the world). And, of course, we will continue to offer the popular Ethical Puzzler that Suzanne Duvall compiles for every issue.

We have revised the Publication Guidelines for articles submitted to the newsletter. The revised guidelines are published elsewhere in this issue.

One Section member suggested that we publish profiles of our members and their accomplishments. We would enjoy publishing at least one profile in each newsletter, but we need your help in keeping us informed about our members' accomplishments and writing those profiles. Please send profiles to us, and we will publish them.

The newsletter is now available on the Section's website, http://www.texasadr.org/. As a general rule, the two most-recent issues will be available only in the members' section, but all the other issues will be available to the general public.

We are always looking for ways to improve the newsletter, so please forward your ideas to us as they occur to you. Please let us know what you think about the new features. You can contact Robyn Pietsch at Rpietsch@central.uh.edu, and you can contact Walter Wright at ww05@txstate.edu.

Chair's Corner
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sometimes occurs when a party in a Texas state court wants a higher court to review an order denying arbitration under the Federal Arbitration Act. Although the Texas Arbitration Act and the Federal Arbitration Act both permit appeals from orders denying motions to compel arbitration, there is Texas judicial precedent that a Texas court is without jurisdiction to permit the appeal of a Texas court's order denying arbitration if the potential arbitration is subject to the Federal Arbitration Act; instead, the precedent requires that the denial of arbitration be reviewed through a request for a writ of mandamus. In many cases, attorneys are faced with the dilemma of not knowing whether the federal or state act applies, or whether both acts apply. To cover all bases, the attorneys file appeals and writ-of-mandamus proceedings. The legislation recommended by the Section's council would resolve this dilemma by expressly authorizing appeals and thereby eliminating the need for mandamus proceedings.

Thank you for the opportunity to chair the ADR Section this year. Thanks also to the council members who made my job easy and enjoyable. We are lucky to have the dedicated individuals who serve on the Section's council.

COUNCIL ESTABLISHES LEADERSHIP SLATE
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The election of officers and new Council members will be held at the ADR Section's annual meeting on June 16 in Austin at the Convention Center -

Hilton Hotel. The annual meeting, luncheon and awards banquet, CLE event, and first Council meeting of the new bar year comprise a full day of activities for the Section held in conjunction with the State Bar of Texas Annual Meeting. All current voting members of the Section are eligible to vote. We truly would like to see you there!

DISPOSITIVE MOTIONS IN ARBITRATION

By Arnold H. Pedowitz and David Harrison***

An issue that increasingly presents itself in the arbitration setting is whether courts will affirm awards where the arbitrator has failed to hold an evidentiary hearing and has instead issued a judgment on the pleadings, a motion to dismiss, or a motion for summary judgment.

In arbitration, there should be a natural reluctance to deny a party his or her "day in court." After all, parties with claims, especially employees bound by mandatory-arbitration clauses in their employment contracts, should not first be denied the protections offered by the court system and then have their claims denied because of an inability to gather the evidence to prove their entitlement to judgment. Some argue that arbitrators who issue final judgments without holding a formal and/or evidentiary hearing violate a party's due process rights. Although courts have often rejected these arguments, absent a finding of a denial of "fundamental fairness," commentators have warned that a "very significant burden of proof" should be imposed before dispositive motions are granted in arbitration.

Unfortunately, there is a stark difference between the moral argument of whether an arbitrator *should* entertain a dispositive motion without first holding a hearing, and the legal question of whether a court *will vacate* an arbitral award based on the granting of such a motion. While the former is a policy question beyond the scope of this paper, the latter is better defined because "the standard of review of arbitral awards is among the narrowest known to law" and "extreme deference" is given to the determination of the arbitration panel." As a consequence of this strict standard, courts have only vacated arbitration awards (other than for such matters as fraud, corruption, violations of public policy, and manifest disregard of the law) in instances where a party has been denied "fundamental fairness."

What is "Fundamental Fairness," and When is it Violated?

In *Prudential Securities, Inc., v. Dalton*, the court explained that fundamental fairness is, in essence, fundamental due process. Citing *Bowles Financial v. Stifel, Nicolaus*, the *Prudential Securities* court reasoned that "[a] fundamentally fair hearing requires the procedural steps of notice, an opportunity to be heard, the opportunity to present evidence which is relevant and material, and arbitrators who are not infected with bias." Likewise, the Fifth Circuit, in *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, explained that "in reviewing the district court's vacatur, we posit the . . . question . . . whether the arbitration proceedings were fundamentally unfair." Nevertheless, courts do not recognize the "fundamentally fair" principle as requiring a per-se, or absolute, right to oral argument, discovery, or an evidentiary hearing. So long as the parties were afforded a "fundamentally fair hearing," as a court understands that term, there is no basis to justify a vacatur of the arbitration award.

Application of Fundamental Fairness to Dispositive Motions in Federal Courts

Courts that have reviewed arbitration awards issued where there was no evidentiary hearing view the issue of fundamental fairness as outcome-determinative. Thus, where courts have determined that the arbitrator provided a "fundamentally fair hearing," summary judgments and/or motions to dismiss were upheld. Conversely, where "fundamentally fair hearings" were denied, courts have reversed the grants of summary judgment and/or motion to dismiss.

For example, in *Sheldon v. Vermonty*, the court dismissed plaintiff's argument that NASD's Procedural Rules and Code of Arbitration Procedure required the arbitration panel to permit discovery and hold an evidentiary hearing before it could dismiss his claims, and it held that an arbitration panel of the NASD has full authority to grant a pre-hearing motion to dismiss with prejudice based solely on the parties' pleadings so long as the dismissal does not deny a party fundamental fairness. Because plaintiff was provided with the opportunity to fully brief and argue the motions to dismiss, the court held that the arbitration panel had the authority to dismiss the claims without permitting discovery or holding an evidentiary hearing.

On the other hand, courts have found fundamental procedural error when a party is not afforded an opportunity to present its case, and an award reached without the benefit of evidence or argument has been held improper. Similarly, in *International Union v. Marrowbone Development Co.*, the court held that because the arbitrator failed to hear testimony, receive evidence and consider arguments, contrary to the arbitrator's role as defined by the Collective Bargaining Agreement, plaintiffs were denied a full and fair hearing; the case was remanded for an evidentiary arbitration hearing.

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DISPOSITIVE MOTIONS IN ARBITRATION
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Application of Fundamental Fairness to Dispositive Motions in State Courts

While the Tennessee Supreme Court recently vacated an arbitration award because the arbitrator failed to provide the parties with a hearing before rendering his decision, as required by Tennessee law, California appellate courts addressing this issue have, like the federal courts, upheld arbitration awards awarded on summary judgment and motions to dismiss. In *Schlessinger v. Rosenfeld, Meyer & Susman*, the court affirmed a trial court's order finding that the language of the California Arbitration Act permitted the arbitrator to rule on summary judgment, and in *Reed v. Mutual Service Corp.*, 106 Cal. App. 4th 1359 (2d App. Dist.2003), the court upheld an award dismissing an investor's claim, explaining that the NASD Code of Arbitration Procedure allows for pre-hearing motions to dismiss.

Two opinions that are somewhat ambiguous are *Jefferson Woodlands Partners, L.P. v. Jefferson Hills Borough*, where the court confirmed an arbitral award of summary judgment but explained that by failing to object, the defendant waived any issues regarding the propriety of maintaining a motion for summary judgment in an arbitration setting, and *Sloan Electric v. Professional Realty & Development Corp.*, where the court held that the arbitrator did not make a gross error of law in resolving one issue without an evidentiary hearing, but the arbitrator's damage award was vacated because it was a gross error of law to determine damages without holding an evidentiary hearing.

Conclusion

Our conclusion pertains primarily to the effect of the above decisions on employment arbitrations. For plaintiffs' attorneys, often representing employees, the courts' reluctance to disturb arbitration awards granting motions to dismiss and/or summary judgment is alarming in that employees are effectively being denied their day in court and an opportunity to be heard. Employers frequently have exclusive access to the relevant evidence, ethical constraints generally preclude the interviewing of employer witnesses, and appellate review is almost non-existent, further compounding the problem with allowing dispositive motions to be made.

By contrast, the allowance of dispositive motions, while reigning in the discovery entitlements of plaintiffs, favors the positions put forward by defendants, who usually are employers. There is an imbalance in the process, and it improperly favors one side. Many employers require arbitration as a condition of employment, and employees have little room to negotiate arbitration clauses. The arbitration forum is acknowledged to be one selected by employers because it does not have the full panoply of discovery rights accorded in litigation, and it historically has provided less protection for employees.

The finality of an arbitration award should operate to lessen the need for, and use of, dispositive motions. Given the narrow scope of review, it is very difficult to have a decision reversed by a court. Accordingly, arbitrators should take every precaution to insure that the nonmoving party is given full discovery before a dispositive motion is entertained. Even then, where issues of credibility are concerned, live testimony should be taken, before hearing such a motion.

** ***Arnold H. Pedowitz*** *is an attorney in the New York City law firm of Pedowitz & Meister, LLP. He received a J.D. from Boston University and an LL.M. in Labor Law from New York University. He is involved in all phases of Employment Law (arbitration, mediation, federal and state court litigation of employment rights, contracts and shareholder disputes). He is a Fellow in the College of Labor and Employment Lawyers, a Fellow in the American Bar Foundation, and a member of the Board of Advisors by designation of the American Bar Association, Labor and Employment Law Section, to the Restatement of Employment Law. He is co-chair of the American Bar Association Labor Section's CLE Committee and a past National Board Member of National Employment Lawyers Association. His publications include: Associate Editor, Covenants Not To Compete, A State by State Survey; Associate Editor, Trade Secrets, A State by State Survey;. Associate Editor, Employee Duty of Loyalty, A State by State Survey; Associate Editor, Tortious Interference in the Employment Context, A State by State Survey; and Senior Editor, Employment Termination Rights and Remedies (2003 Supplement). He is an adjunct professor of Pretrial Practice and Ethics at Benjamin N. Cardozo School of Law at Yeshiva University and a Co-Chair and lecturer at the Law Education Institute in Snowmass, Colorado.*

** ***David Harrison*** *is an associate attorney in the New York City law firm of Pedowitz & Meister, LLP, where he has worked since graduating from Benjamin N. Cardozo School of Law in 2004. His practice focuses on employment law and litigation, probate, and real estate. He completed undergraduate and master's degrees in Talmudic law while studying in rabbinical seminaries in the United States, France, and Israel and was ordained as a Rabbi.*

ENDNOTES

[1] *See* 22 Franchise L.J. 85 (2002).

[2] Brown v. Coleman Co., 220 F.3d 1180, 1182 (10th Cir. 2000).

[3] *See* Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir., 1997) (an arbitrator's decision may be vacated if there has been a denial of fundamental fairness of the arbitration proceeding"); British Ins. Co. of Cayman v. Water St. Ins. Co., 93 F. Supp. 2d 506, 517 (S.D.N.Y. 2000) ("proper analysis it to determine if the aggrieved party was denied "fundamental fairness"); Ashraff v. Republic N.Y. Sec. Corp., 14 F. Supp. 2d 461, 464 (S.D.N.Y., 1998) ("where fundamental fairness is violated, the panel's determination becomes open to judicial review").

[4] 929 F. Supp. 1411 (N.D. Okla. 1996).

[5] 22 F.3d 1010 (10th Cir. 1994).

[6] Prudential Securities, 929 F. Supp. at 1416.

[7] 915 F.2d 1017 (5th Cir., 1990).

[8] *Id.* at 1020; *see also* Nat'l Cas. Co. v. First State Ins. Group, 430 F.3d 492, 497 (1st Cir. 2005); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir.1985); Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974).

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TO ARBITRATE OR NOT TO ARBITRATE? THE QUESTION IS ANSWERED

By Ralph Rodriguez*

Last year, the U.S. Supreme Court granted certiorari in *Buckeye Check Cashing, Inc. v. Cardegna*,[1] and an article in the Fall 2005 issue of *Alternative Resolutions* discussed the case in detail.[2] The case was an appeal from a decision of the Florida Supreme Court that denied the applicability of the separability doctrine to an arbitration clause in a contract that arguably was criminal and void ab initio under state law. Florida law requires state courts to determine whether a contract is criminal and void ab initio before enforcing any of the contract's provisions, including an arbitration provision. The question presented in *Cardegna* was whether the Federal Arbitration Act ("FAA") preempted Florida's law and required a Florida state court, pursuant to the separability doctrine, to compel arbitration before it determined whether a contract existed.[3] The U.S. Supreme Court, reversing the Florida court, held that whether brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court.[4]

The U.S. Supreme Court began its analysis by questioning whether an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality. First, the Court reasoned, as a matter of substantive federal arbitration law and as held in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, an arbitration provision is severable from the remainder of the contract.[5] Second, the Court noted its holding in *Prima Paint*, a case involving fraudulent inducement, that unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.[6] Third, *Southland Corp. v. Keating* held this rule applicable in state as well as federal courts.[7] The Court determined that the Florida court erred in declining to apply *Prima Paint's* severability rule, and the respondents' assertion that that rule did not apply in state court ran contrary to *Prima Paint* and *Southland.*

Next, the Court reviewed two types of challenges to the validity of arbitration agreements. One type challenges specifically the validity of the agreement to arbitrate. The second challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.,* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions (*e.g.*, a usurious interest clause) renders the whole contract invalid.[8] The *Cardegna* respondents' claim challenged the contract as a whole, but unlike the claim in *Prima Paint*, which alleged an entire contract was voidable because of fraud in the inducement, the *Cardegna* respondents' claim was that the entire agreement was void ab initio under state law. The Court recalled that in *Prima Paint*, it had addressed the question of who -- court or arbitrator – should decide these two types of challenges and had resolved the issue in favor of the arbitrator. Also in *Prima Paint*, the Court had rejected the view that the question of "severability" was one of state law and that if state law held the arbitration provision not to be severable, a challenge to the contract as a whole would be decided by the court. In *Cardegna*, the Court extended the *Prima Paint* rule to apply to an allegation that an entire contract is void ab initio under state law.

Finally, the Court reasoned that *Prima Paint* and *Southland* answer the question of severability by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The Court noted that when the Florida court declined to apply *Prima Paint's* rule of severability, it had relied on the distinction between void and voidable contracts. "Florida public policy and contract law," the Florida court had concluded, permit "no severable, or salvageable, parts of a contract found illegal and void under Florida law."[9] But the U.S. Supreme Court found that *Prima Paint* rendered the Florida court's conclusion irrelevant. The Court also pointed out that in *Southland*, it had rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action. So in *Cardegna*, the Court did not accept the Florida court's conclusion that enforceability of the arbitration agreement should turn on Florida public policy and contract law.

The Court acknowledged that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void, but it reasoned that it is equally true that the respondents' approach would permit a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. The Court determined that *Prima Paint* resolved this conundrum -- and resolved it in favor of the separate enforceability of arbitration provisions. Therefore, regardless of whether the challenge is

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SUPREME COURT OF TEXAS COMPELS EMPLOYEE TO ARBITRATE DEFAMATION CLAIM AGAINST EMPLOYER

By Melissa Martinez*

This original mandamus proceeding concerned the validity and scope of an arbitration agreement between an employer, Dillard Department Stores, Inc. ("Dillard"), and a long-time employee, Andrea Martinez.[1]

Martinez signed an arbitration agreement in August of 2000, in which she acknowledged receipt of the rules of arbitration, agreed to be subject to the rules in the agreement, and consented that her continued employment constituted acceptance of its provisions. The arbitration agreement specifically applied to employment claims arising from violations of the law or personal injuries related to termination of employment. Worker's compensation claims were excluded from the arbitration agreement.

In November 2002, Dillard terminated Martinez's employment. She filed a cause of action for defamation against Dillard, District Manager Grizelda Reeder, and two unnamed employees approximately one year later. Dillard moved to compel arbitration under its revised 2002 arbitration rules, which explicitly included defamation claims. Martinez argued that she never agreed to the 2002 rules and claimed that Dillard's filing to compel arbitration under the revised rules showed that Dillard intended to retain the right to unilaterally modify the arbitration agreement.

An employer's intent to unilaterally modify the agreement is significant, because it serves to invalidate the arbitration agreement signed by the employee and employer. However, in response to Martinez's objection to the application of the 2002 arbitration rules, Dillard agreed that the 2000 rules applied in this case.

In seeking to compel arbitration under the Federal Arbitration Act (FAA), a party must establish that (1) there is a valid arbitration agreement and (2) the claims raised fall within that agreement's scope. Dillard argued that although defamation claims were not specifically mentioned in the 2000 rules, Martinez's defamation claim was still covered under the arbitration agreement since defamation is a personal injury.

Martinez claimed that the term "personal injuries" could only be read to mean bodily injuries. However, Texas courts have interpreted the phrase "personal injuries" to include injuries to reputation.[2] Because a court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue,"[3] the Supreme Court of Texas held that the trial court was obligated to compel arbitration.

Martinez further argued that her claims did not arise from the termination of her employment and thus were not arbitrable under the agreement. The Supreme Court of Texas disagreed with Martinez on this point as well. Martinez alleged defamation based on comments made close to the time of her termination and sought damages based on loss of earnings and earning capacity. The Court held that Martinez's claims fell within the scope of the arbitration agreement and directed the trial court to order that her claims proceed to arbitration under the Federal Arbitration Act.[4]

**** Melissa Martinez** has a bachelor's degree in business administration with an emphasis in human resource management from Texas A&M University. Her work experience in human resources includes employee recruiting and staffing, compensation, and benefits administration. Melissa received a master's degree in legal studies from Texas State University-San Marcos in December 2005 and is now a paralegal in the litigation section at Andrews Kurth LLP in Austin.*

ENDNOTES

[1] Dillard Dep't Stores, Inc. v. Martinez, 49 Tex. Sup. Ct. J. 295, 2006 WL 197457 (Tex. Jan. 27, 2006) (per curiam).

[2] *Id.* at *2 (citing Houston Printing Co. v. Dement, 44 S.W. 558, 560 (Tex. Civ. App. – Galveston 1898, writ ref'd), Brewster v. Baker, 139 S.W.2d 643, 645 (Tex. Civ. App. – Beaumont 1940, no writ)).

[3] *Id.* (citing Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 899 (Tex. 1995).

[4] *Id.* at *2-*3.

We seek peace, knowing that peace is the climate of freedom.

Dwight D. Eisenhower

TEXAS MEDIATOR CREDENTIALING ASSOCIATION ADOPTS NEW CONTINUING EDUCATION REQUIREMENTS

By Suzanne Mann Duvall*

In response to concerns expressed by individual credential holders, potential credential holders, and participating organizations occupying seats on the Texas Mediator Credentialing Association (TMCA) Board of Directors as to the difficulty of meeting the stringent and somewhat onerous continuing education requirements (particularly at the advanced and distinguished credential levels) for maintaining and renewing a credentialed status on an annual basis, the TMCA Board has amended the continuing education requirements as follows:

To maintain TMCA Credentialed Status at any level, by January of each year, mediators must annually complete fifteen (15) continuing education hours that meet TMCA criteria, which must include three (3) hours of ethics in mediation. While there are no maximum numbers of hours for courses in mediation, facilitation, negotiation, or other related courses, at least ten (10) hours (including hours in mediation ethics) must be in these subjects. In addition, a maximum of five (5) hours may be education in a subject matter area involved in the cases mediated. The subject matter education must be provided through an organization recognized by practitioners in the subject matter area for providing such training and issue certificates of completion of training.

Three (3) hours maximum of the fifteen (15) hour requirement may be met by self-study, and five (5) hours maximum of the fifteen (15) hour requirement may be met as a trainer in mediation.

For more information and full criteria, please refer to the TMCA's website at www.txmca.org.

***Suzanne Mann Duvall** is the ADR Section's representative on the TMCA Board.*

Mediation Conference in Uruguay

First National and International Mediation Congress for the Southern Cone of South America, May 26-27, 2006, Colonia del Sacramento, Uruguay. For further information, contact Dra. Rosana Hernández at med-hernandez@adinet.com.uy or Walter Wright at ww05@txstate.edu.

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brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

** **Ralph Rodriguez**, a San Marcos, Texas native, was born in San Marcos and graduated from San Marcos High School. He received an undergraduate degree from Southwest Texas State University in San Marcos in 1989, and he currently is enrolled in the graduate Legal Studies Program at Texas State University. His wife is employed at the University of Texas at Austin, and his son is eighteen years old. He is employed as a paralegal at the Law Offices of Deborah Green & Kris Hochderffer, L.L.P. in Austin.*

ENDNOTES

[1] Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 861 (Fla. 2005), *cert. granted*, 125 S. Ct. 2937 (2005) (No. 04-1264, 2004 Term).

[2] Ralph Rodriguez, *Determining Separability Of Arbitration Clauses In (Arguably) Void Contracts: Responsibility Of Judge Or Arbitrator?*, Alternative Resol., Nov. 2005, at 16.

[3] Brief for the Respondents, Cardegna v. Buckeye Check Cashing, Inc., 2005 WL 2376814 (Sept. 23, 2005).

[4]. Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, (2006).

[5] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 at 400, 402-04 (1967).

[6] *Id.* at 403-04.

[7] Southland Corp. v. Keating, 465 U.S. 1, 12 (1988).

[8] *Id.* at n. 5 and n.6.

[9] *Id.* at n. 1.

FIFTH CIRCUIT HOLDS THAT INSURER'S RIGHT TO PARTICIPATE IN THE SETTLEMENT PROCESS IS "AN ESSENTIAL PREREQUISITE" TO ITS OBLIGATION TO PAY A SETTLEMENT

By Tracy Engle*

On February 6, 2006, the U.S. Fifth Circuit Court of Appeals reviewed a ruling of the Southern District of Texas that held that an insured "take nothing" in a lawsuit it filed against its insurance company.[1] The insurance company refused to reimburse its insured for settlement of a personal injury claim because it was not permitted to participate in the settlement process, which it claimed was a breach of the insurance policy. A Texas Supreme Court ruling in *Hernandez v. Gulf Group Lloyds*[2] had held that an insurer must be prejudiced by the settlement in order to avoid liability on the basis of its insured violating the "consent-to-settle" clause. Based on *Hernandez*, the Fifth Circuit initially vacated the lower court's decision and remanded the case to the district court to determine if the insurer suffered "actual, concrete" prejudice from the breach.[3] Upon rehearing on March 28, 2006, the court of appeals concluded that an insurer's right to participate in the settlement process is "an essential prerequisite" to its obligation to pay a settlement and that being denied the opportunity to do so prejudiced the insurer as a matter of law. As a result, the Fifth Circuit withdrew its original opinion and affirmed the "take nothing" decision of the district court.

Chronology of Events[4]

July 2001 A storage tank exploded at a Motiva refinery. The explosion killed one employee and injured others. Several lawsuits ensued, one of which was brought by John and Pamela Beaver for injuries John suffered in the explosion. The Beavers' case hereinafter is referred to as "*Beaver.*"

Motiva was insured by National Union. The umbrella policy supplied coverage once underlying insurance was exhausted.

July 2002 Motiva notified National Union of the lawsuits, including *Beaver*, and requested a defense.

Feb. 2003 National Union disclaimed coverage because underlying insurance policies had not yet been exhausted.

May 2003 National Union sent Motiva a "reservation of rights" letter withdrawing its disclaimer of coverage, but reserving the right to withhold or limit coverage under the terms and conditions of the policy.

July 28, 2003 Motiva notified National Union that the St. Paul policy had been exhausted and that National Union would be responsible for the defense costs related to the remaining lawsuits.

July 28, 2003 Motiva asked National Union to send a representative with full settlement authority to the mediation in *Beaver*. National Union immediately requested all documents related to *Beaver*.

Aug. 1, 2003 Motiva rejected National Union's request for documents in *Beaver*, claiming National Union never acknowledged coverage for the case. Despite the refusal to furnish *Beaver* documents, Motiva still demanded that National Union attend the mediation.

Aug. 6, 2003 National Union offered to defend *Beaver* and other lawsuits, subject to a reservation of its right to deny coverage under the terms of the policy. National Union asked Motiva to cooperate with its defense as required by the policy. National Union also stated that it expected to participate in the *Beaver* mediation. Motiva still refused to provide *Beaver* documents to National Union.

Aug. 8, 2003 National Union sent a representative to the *Beaver* mediation. Before the mediation concluded, the representative was asked to leave. The mediation continued and ended with a voluntary settlement agreement by Motiva to pay $16,500,000 to resolve the claim.

After mediation, Motiva asked National Union to finance the settlement. National Union refused because it had not given its consent, a requirement of the "consent-to-settle"

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Fifth Circuit Holds That Insurer's Right To Participate In The Settlement Process is "An Essential Prequisite" To Its Obligation To Pay a Settlement
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clause of the insurance policy. Motiva paid the settlement from its own funds and filed suit to recover the money it paid in the *Beaver* settlement.

Dec. 2003 Parties submitted stipulations of fact and chronology. Both parties filed motions for summary judgment.

Aug. 26, 2004The district court granted partial summary judgment in favor of National Union because Motiva breached the "consent-to-settle" and "cooperation" clauses in the policy. Motiva filed a Motion for Reconsideration and to Amend Judgment and included affidavits contradicting facts in the summary judgment record. National Union filed a response in opposition along with a motion to strike Motiva's affidavits as offering new facts. The district court denied Motiva's motion and stated that Motiva could not introduce new facts.

Fifth Circuit's Consideration of Motiva's Arguments

Motiva argued that when National Union's offer to defend the lawsuits was subject to its reservation of rights to later deny coverage, Motiva was entitled to settle the Beaver case without consulting National Union. Motiva relied on *Rhodes v. Chicago Ins. Co.*[5] to support its argument. *Rhodes* held that "[i]f the insurer properly reserved its rights and the insured elected to pursue its own defense, the insurer is bound to pay damages which resulted from covered conduct and which were reasonable and prudent up to the policy limits." [6] *Rhodes* further held that "the insured is not constrained by conditions in the policy which limit the insured's ability to settle the claim, and the insurer cannot complain about the insured's conduct of the defense."[7]

The court of appeals stated that its prior ruling in *Rhodes* is undermined by the Texas Supreme Court decision in *State Farm Lloyds Ins. Co. v. Maldonado*,[8] which held that because an insurer agreed to defend its insured under a reservation of rights clause and the insured failed to satisfy a condition of the policy, the insured could not recover under the policy. The court of appeals further explained that under *Erie R. Co. v. Tompkins*[9] it was required to determine questions of state law as it believed the state would rule on the issue.[10] The court therefore determined that under *Maldonado*, an insurer is entitled to enforce the "consent-to-settle" clause, and that its ruling in *Rhodes* did not follow Texas law.[11] Thus, the district court did not err in holding that Motiva breached its insurance policy by settling without National Union's consent.[12]

To counteract the effect of *Maldonado*, Motiva relied on the *Hernandez* holding that an insurer must actually be prejudiced by the insured's settlement in order to avoid liability on the basis of settlement-without-consent. In another court of appeals decision, *Hanson Prod. Co. v. Americans Ins. Co.*,[13] the court of appeals had applied *Hernandez* and ruled that the insurer must show prejudice to avoid payment of a claim when the insured failed to comply with a "prompt notice" provision of its policy. In yet another case, *Ridglea Estate Condominium Ass'n v. Lexington Ins. Co.*,[14] the court had applied *Hernandez* and determined that the district court erred in holding that an insurer was not required to show prejudice to use a violation of a "prompt notice" provision in order to avoid payment of a claim. However, the court also noted in *Ridgelea* that it did not interpret *Hernandez* as necessarily creating a prejudice requirement for all Texas insurance policies.[15]

Fifth Circuit's Ruling

In considering the above-mentioned cases, the court ruled that it is not clear whether Texas law requires an insurer to show prejudice in order to be released from liability when the insured breaches a "consent-to-settle" provision of the insurance policy. The court also determined that National Union was prejudiced as a matter of law because National Union was not consulted about the settlement and that it did not have the chance to participate in or consent to the settlement.[16] The court held that an insurer's right to participate in the settlement process "is an essential prerequisite to its obligation to pay a settlement."[17] This ruling made it unnecessary for the court to rule whether Motiva breached the cooperation clause. Based on the foregoing, the court affirmed the "take-nothing" decision of the district court.

The lesson learned from this ruling is that an insured with a "consent-to-settle" clause in its insurance policy must allow its insurance company to participate fully in the settlement process of claims, otherwise the insured cannot expect to recover fees it pays to settle those claims.

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ENDNOTES

[1] Motiva Enterprises v. St. Paul Fire & Marine Ins. Co., 439 F.3d 243 (5th Cir. 2006).
[2] 875 S.W.2d 691 (Tex.1994).
[3] Motiva, 439 F.3d at 247.
[4] Motiva Enterprises v. St. Paul Fire & Marine, No. 05-20139, 2006 WL 774926, at *1-2 (5th Cir. March 28, 2006).
[5] 719 F.2d 116 (5th Cir.1983).
[6] *Id.*
[7] *Id.*
[8] 963 S.W.2d 38 (Tex. 1998).
[9] 304 U.S. 64 (1938).
[10] Motiva Enterprises v. St. Paul Fire & Marine, No. 05-20139, 2006 WL 774926, at *3 (5th Cir. March 28, 2006).
[11] *Id.*
[12] *Id.*
[13] Hanson Prod. Co. v. Americans Ins. Co., 108 F.3d 627 (5th Cir. 1997).
[14] 415 F.3d 474 (5th Cir.2005).
[15] Motiva, 2006 WL 774926 at *4.
[16] *Id.*
[17] *Id.*

SUPERIOR COURT OF NEW JERSEY SETS GUIDELINES IN *LEHR V. AFFLITTO* FOR MEDIATOR CONFIDENTIALITY IN SUBSEQUENT TRIALS

By Steven M. Fishburn*

A recent opinion of the Superior Court of New Jersey, *Lehr v. Afflitto*, [1] although technically still subject to review by the Supreme Court of New Jersey, has the potential of establishing guidelines for issues of mediator confidentiality that arise at a hearing or trial that occurs after a mediation. Short of a showing that confidentiality has been expressly waived,[2] that an exception exists that would allow disclosure,[3] or that the evidence is unobtainable in any other way and there is such a need for the evidence that it substantially outweighs the interest in protecting confidentiality,[4] the holding in this case bars a mediator from participating in "any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter."[5]

Lehr and Afflitto were attempting to reach a settlement in a divorce case that Mr. Kahan was mediating. One of the primary ground rules set out by Mr. Kahan, prior to initiating the mediation, was that there would be no binding settlement agreement until there was a signed property agreement.[6] Although it was subsequently disputed, at a stage which ordinarily would have been near the close of the mediation, Mr. Kahan attempted to summarize what he considered the points of agreement in a Memorandum of Understanding. The memo listed approximately thirteen areas of agreement, but went on to mention three unresolved items: (1) amount of child support obligation; (2) financial responsibility for the children's college education expenses; and (3) allocation of interim marital expenses.[7] Some time after receiving the memo from Kahan, Mr. Afflitto decided the agreement was not in his best interests and rejected the terms contained in the memo.[8] There followed a period of confused missteps and letters crossing in the mail, culminating in Lehr, Lehr's attorney, and Afflitto's attorney appearing before a family court judge. Afflitto did not appear because both he and his attorney had understood it was only a case-management hearing.[9] Over the objection of Afflitto's attorney, who insisted there was no final property settlement agreement, the trial court entered a decree of divorce, dismissed Afflitto's counterclaim of no agreement, and incorporated Kahan's memo and its terms into the divorce decree.[10]

Afflitto appealed on the grounds that the court had erred in saying Kahan's memo constituted the parties' agreement because it was not an enforceable contract (he had not agreed to it), that the judge had improperly denied his request for a *Harrington* hearing,[11] and "that public policy considerations of confidentiality underpinning the mediation process prohibited the enforcement of the purported agreement."[12] The Superior Court of New Jersey found that there was a legitimate question as to whether there was an agreement and remanded the case for the *Harrington* hearing that the lower court had denied.[13]

On remand, a confusing situation became even more complicated and confusing as the trial court allowed the Kahan memo to be entered into evidence and also allowed testimony from Kahan, who had been called by Afflitto's attorney as to whether he thought the parties had a binding agreement. Kahan testified, "No."[14] Despite this testimony and other evidence that pointed to no agreement of the parties, the trial judge ruled there had been a meeting of the minds on at least the thirteen items in Kahan's memo. The trial court reasoned that had there been no agreement, Afflitto would not have been obliged to communicate that he no longer agreed to the provisions of the memo.[15] The trial court also affirmed the divorce decree.

Afflitto filed a second appeal to the Superior Court of New Jersey, where he asserted error in the affirmation of the divorce decree. He argued that he could not be bound by the terms of the Kahan memo because it was a preliminary agreement, and that the trial court had erred by incorporating the Kahan memo into the divorce decree as the terms of the parties' settlement agreement.[16]

The Superior Court focused like a laser on the fact that Kahan had testified at the trial court's *Harrington* hearing and on the content of Kahan's testimony. The court left no doubt about its level of concern. The court said, "Kahan was then permitted to answer all questions concerning the mediation

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SUPERIOR COURT OF NEW JERSEY SETS GUIDELINES IN *LEHR V. AFFLITTO* FOR MEDIATOR CONFIDENTIALITY IN SUBSEQUENT TRIALS

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process, what transpired with respect to the issue of settlement, and whether he believed the parties had arrived at a binding settlement."[17] The subpoenaing of Kahan by defense counsel and the procedures she employed troubled the court, which considered the issue of confidentiality of mediation proceedings a matter of great public and systemic importance.[18]

The court's analysis of these facts and the decisions of the trial court proceeded on these grounds: (1) that there was no express waiver of the confidentiality provisions of the court rules; (2) that there was no final binding settlement agreement between the parties because even the Kahan memo acknowledged there was no agreement on several critical financial matters;[19] (3) that bifurcation of marital dissolution or custody from issues of disputes involving support and equitable distribution are permitted with the approval of the presiding judge of the trial court, but only in extraordinary circumstances, which were not present in these facts;[20] (4) that a "mediator may not be compelled to provide evidence of a mediation communication;"[21] (5) that the New Jersey Rules of Court place restrictions on mediators, specifically that, "No mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter;"[22] (6) "Kahan's testimony did not substantially outweigh the private and public interest in protecting confidentiality;"[23] and, most importantly, (7) that in accord with the Supreme Court of New Jersey's decision in *State v. Williams*, "under a plain reading of the rule, a mediator is generally prevented from testifying as a witness in a trial or hearing related to the mediated matter."[24] The appellate court reversed the trial court and remanded the case for trial.

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ENDNOTES

[1] Lehr v. Afflitto, 889 A.2d 462 (N.J. Super. Ct. App. Div. 2006).
[2] *Id. at 473 (discussing the section of the New Jersey statute, N.J.S.A. 2A:23C-4, that codifies a provision of the Uniform Mediation Act (UMA) principle allowing a party to expressly waive the confidentiality privilege).*
[3] *Id.* at 473 (listing the seven exceptions contained in N.J.S.A. 2A:23C-4 that allow a mediation communication to be divulged).
[4] *Id.* at 475 (referring to the test contained in State v. Williams, 877 A.2d 1258 (N.J. 2005) for piercing the mediation privilege).
[5] New Jersey Rules of Court, Rule 1:40-4(c) (2006) *available at* http://www.judiciary.state.nj.us/rules/r1-40.htm .
[6] *Lehr*, 889 A.2d at 465.
[7] *Id.* at 464.
[8] *Id.* at 465.
[9] *Id.* at 465.
[10] *Id.* at 466.
[11] *Id.* at 466 (referring to requirement contained in Harrington v. Harrington, 656 A.2d 456 (N.J. Super. Ct. App. Div. (1995) for a hearing to be held in the event of a dispute between the parties as to whether there was an agreement).
[12] *Id.* at 466.
[13] *Id.* at 466.
[14] *Id.* at 470.
[15] *Id.* at 471.
[16] *Id.* at 471.
[17] *Id.* at 472.
[18] *Id.* at 472 (citing State v. Williams, 877 A.2d 1258 (N.J. Superior Ct. App. Div. (2005)).
[19] *Id.* at 475-76.
[20] *Id.* at 476
[21] *Id.* at 473 (discussing N.J.S.A. 2A:23C-4 provisions that incorporate UMA principles).
[22] *Id.* at 472.
[23] *Id.* at 475.
[24] *Id.* at 474 (quoting from State v. Williams, 877 A.2d 1258 (N.J. 2005)).

DISPOSITIVE MOTIONS IN ARBITRATION

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[9] See Doctor's Assoc., Inc., v. Distajo, 66 F.3d 438, 448 (2nd Cir. 1995) ("oral argument is not a necessary component of due process in all circumstances"); Warren v. Tacher, 114 F. Supp. 2d 600 (W. D. Ky. 2000) ("petitioners are not entitled to costly full-blown discovery when it would not change the outcome and the claim could be decided on a pre-hearing motion"); Griffin Indus., Inc., v. Petrojam, Ltd., 58 F. Supp. 2d 212, 219-20 (S.D.N.Y. 1999) ("while hearings are advisable in most arbitration proceedings, arbitrators are not compelled to conduct oral hearings in every case").
[10] 269 F.3d 1202 (10th Cir., 2001).
[11] See also Vento v. Quick & Reilly, Inc., 128 Fed. Appx. 719 (10th Cir. 2005) (where claims were facially deficient and the party had no relative or material evidence to present at an evidentiary hearing, "dismissal on the pleadings was precisely the appropriate procedural disposition"); Generica Ltd., v. Pharm. Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997) (arbitrators are not required to conduct a formal evidentiary hearing so long as the proceeding is otherwise fundamentally fair); Wise v. Wachovia Sec., LLC., 2005 US Dist. Lexis 13630 (N.D. Ill. 2005) (despite not having a formal evidentiary hearing, plaintiff received a fundamentally fair hearing because the arbitrator had received the parties' pleadings, discovery responses, and other materials); Warren v. Tacher, 114 F. Supp. 2d 600 (W.D. Ky. 2000) (petitioners had a hearing in that they were given adequate opportunity to respond to the motion to dismiss, did so, and were represented by counsel at oral arguments); Pacific Breakwater West, Inc. v. Wellness Int'l. Network, 2000 US Dist. Lexis 3109 (D.C. Tex. 2000) (summary judgment proper despite the lack of a formal hearing); Castleman v. AFC Enters., Inc., 995 F. Supp. 649, 653 (N.D. Tex. 1997) ("arbitration awards will not be set aside due to the arbitrator's refusal to hear evidence unless the exclusion of the contested evidence prevented the parties from receiving a fundamentally fair hearing").
[12] Teamsters Local 312 v. Matlack, Inc., 118 F.3d 985 (3rd Cir. 1997).
[13] 232 F.3d 383 (4th Cir., 2000).
[14] *See also* Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997) (arbitrator's refusal to continue the hearings to allow witness to testify amounted to fundamental unfairness and misconduct sufficient to vacate the award); Hoteles Condado Beach v. Union de Trongquistas, 763 F.2d 34, 40 (1st Cir. 1985) ("vacatur is appropriate . . . when the exclusion of relevant evidence so affects the rights of a party that it may be said that he was deprived of a fair hearing).
[15] Searcy v. Herold, 2005 Tenn. App. LEXIS 625 (2005) (citing Tenn. Code Ann. § 29-5-306 (2000)).
[16] 40 Cal. App. 4th 1096, 47 Cal. Rptr. 2d 650 (2d App. Dist. 1995).
[17] 881 A.2d 44 (Pa. 2005).
[18] 819 N.E.2d 37 (Ill. 2004).
[19] We have no argument with dispositive motions being used to address technical arguments on which factual discovery can have no effect.

MEDIATION: A CONTRIBUTION TO THE TRANSFORMATION OF SOCIAL RELATIONSHIPS IN ARGENTINA[1]

By Alejandro M. Nató,* María Gabriela Rodríguez Querejazu, and Liliana M. Carbajal*****

(Note from the Chair of the Newsletter Editorial Board: This article continues a series, begun last year, whose purpose is to expose our readers to perspectives on Alternative Dispute Resolution from other parts of the world. If you are aware of ADR initiatives in other countries that may be of interest to our readers, please contact Walter A. Wright at ww05@txstate.edu.)

Various analyses of contemporary times coincide in pointing to globalization as a radical and irreversible change. Zygmunt Bauman refers to it as "a great transformation that has affected state structures, labor conditions, interstate relationships, collective subjectivity, cultural production, daily life, and relationships between one human being and another."[2] At the same time, some existing structural problems like unemployment, poverty, and violence, together with growing inequality, have led to settings of fragmentation, urban social destabilization, and the consequent erosion of social ties. Some of the contemporary socio-cultural conditions can be formulated, according to Martín Hopenhayn,[3] as:

- a political-cultural disequilibrium, where citizens' practices do not flow towards a focal axis of struggle (the State, the political system, or the Nation as its territorial expression), but instead are disseminated in a plurality of fields of action, and many of these fields tend to be considered as cultural or "identity-based" conflicts.
- a "boom" of difference and the promotion of diversity, which means that many fields of cultural self-affirmation or identity, which before were the exclusive province of private negotiations, today have become the province of civil society, of the political flux and the public flux of associated claims.
- a passage from the logic of representation to the logic of networks, where demands depend less on the political system that processes them and more on the communicative acts that flow through the multiple networks of information.

This complex framework of transformations of the social dynamic constitutes a fertile field for the emergence of a multiplicity of different kinds of social and/or community conflicts, which take on multiple forms and different intensities. Likewise, the conditions of social exclusion present in current societies are generators or producers of setting of confrontation. It is necessary, then, to find new responses that call for political, economic, and social decisions together with appeals for articulation and recomposition of the different social actors.

In Argentina in recent years, as in other countries, methods for the pacific resolution of conflicts have been developed. Among these methods, mediation presents itself as a useful instrument for building a more-complete democracy within the framework of pluralism. However, work in social, public, and intercultural conflicts has revealed to us that not every definition of mediation is adequate or sufficiently comprehensive with respect to the multiple issues that must be approached in order to contribute to the transformation of social relationships. We, therefore, use a definition of Jean F. Six that is, in our view, a basis from which to draw a perspective on the way to think about and use mediation with such an objective. He refers to mediation as: *"a space of personal and social creativity, a fulfillment of citizenship."*[4]

Understanding the practice of citizenship as the result of complex processes in which conflict and confrontation necessarily will be present, it is essential to favor social dialogue. This dialogue surely will have moments of consensus and of conflict, accepting that consensus does not suppose unanimity but "a process of undertakings and convergences in continuous change among divergent convictions."[5] Because mediation proposes to facilitate this dialogue, we can consider it an invaluable instrument for this purpose.

If the setting in which citizenship is practiced is a city, a multiplicity of issues is revealed and must be approached. In a city, as Jordi Borja points out,[6] interchanges occur in a confluence of diversity and group activities, and the density of social relationships unfolds. At the same time, it is the place of community spirit, where processes of social cohesion exist and where processes of exclusion are verified; a place where cultural rules will be present in collective behavior, where identity is expressed materially and symbolically in public spaces and in daily life. It is also where citizens fulfill themselves through participation in public affairs; the city is, definitively, the place of politics.

Mediation in the urban social context can be defined, then, as: *"A human resource and a civic instrument through which members of a society may process their differences and/or manage conflicts that are presented to them in private or public contexts, as well as participate in the construction of the society to which they belong."*[7]

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Given this definition, community mediation establishes a different way of conceiving conflict, the purposes of interventions, the role of the participants in processes, the profile and role of the mediator. In this way, we understand community mediation as the multiplicity of processes from which we intervene in the urban social context in general and in some contexts in particular. With this criterion, we can establish three large categories of conflicts—community conflicts, public conflicts, and intercultural conflicts—keeping in mind that each conflict can be considered simultaneously as part of more than one category. At the same time, the ideas of community mediation can be translated into contributions relative to:

- the diffusion of its values, stimulating self-reflection and responsibility, while attempting to raise the need for establishing new pacts for continuing to live together, without exclusions of any type.
- the transfer of techniques and tools to individuals and/or groups of individuals for the purpose of providing them with skills that facilitate their social lives and that, at the same time, help to make possible peaceful coexistence enriched by diversity a reality.
- the establishment of social networks that stimulate and favor social or community relationships in a process of construction, individual as well as collective, that promotes a dynamic exchange among those who participate in it.
- the maximization of resources and the creation of better alternatives for the resolution of problems or the satisfaction of needs.
- the treatment of differences that arise among individuals and groups of individuals, whether in private or public contexts, in a space of democratic dialogue based on the self-determination of those who participate.

In the social or community context, mediation promotes a culture based on self-determination and on the initiative of individuals or social actors. In this sense, we can think of it as a peaceful form of conflict management that encourages persons or groups to assume active roles as they are assisted by mediators.

As seen above, the mediator figures as a facilitator of the process. But the complexity of contemporary life and the new socio-cultural conditions described above make a new mediator profile necessary, one that is backed by solid training based on knowledge from different disciplines, by specific techniques and tools, and with a certain attitude. Equally important, in a conflict situation or relationship, problems of different types can come together, and the mediator must understand them in order to act positively. Work in interdisciplinary teams guarantees a more thorough perspective for observing and intervening in these problems and contributing to their understanding.

Interventions in social contexts, which often become more mobile, fragmented, and strongly diversified as time passes, require much more than supposedly neutral third parties. As mediators, we can commit ourselves, or not, to become more. We can make available mediation tools for building bridges between different socio-cultural groups. We can become involved in this undertaking that proposes to intervene with respect and recognition of the other in settings marked by the abyss of inequality. Then we can design and propose intervention processes for repairing the social fabric where there are ruptures, or establishing ties where difference and indifference hinder the possibility of forming a whole. Those who wish to play this role must, fundamentally, undertake personal transformations in their ways of conceiving relationships with other people, in their ways of constructing their places as third parties, in their capacities to create a meeting space and encourage the true emancipation of individuals.

From this perspective, we then can make modest but significant contributions to the aspiration of building a pluralist, equitable, and integrated society-city. Paraphrasing Bauman, "to live together in a world of differences" is the phrase that represents the purpose that summons us.

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***** Liliana María Carbajal*** *is an Argentine architect who graduated from the University of Buenos Aires, where she has also served as an instructor and researcher. She is a specialist in community mediation. Currently, she is a mediator in the Conflict Resolution Center of the Central Society of Architects. She has spoken at numerous national and international conferences on the subject of conflict resolution.*

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ADVANCED TECHNIQUES FOR BREAKING IMPASSE AND BRIDGING GAPS IN MEDIATED SETTLEMENTS

*By John W. Cooley**

Often, the parties to a mediation are able to negotiate monetary issues, with the help of the mediator, to a numerical bracket, but they are unable or unwilling to move off their respective dollar positions and close the gap. When this situation occurs, either the mediator or the parties, individually or jointly, should consider using proven techniques for breaking impasse. There are numerous techniques for doing this, but in this article I will address only two advanced techniques for breaking impasse and bridging gaps. More than two hundred other creative techniques for breaking impasse appear in my book, *Creative Problem Solver's Handbook for Negotiators and Mediators* (two volumes), recently published by the American Bar Association with the generous support of the Association for Conflict Resolution (see www.abanet.org/dispute). I have successfully employed the two advanced techniques described below to resolve complex, multiparty, multi-million-dollar disputes, but the techniques also can be used to bridge negotiating brackets in small money-damage cases. The two advanced techniques are the Creo Pie Chart and Blind Bidding with Conditions.

The Creo Pie Chart

The Creo Pie Chart is named for its creator, Robert A. Creo, a nationally recognized mediator and arbitrator and founder of the International Academy of Mediators. The concept of using a pie chart has very simple roots. First, as children, some of us learned a technique to ensure fairness in dividing into two or more parts an object that was to be shared. For example, if two children wanted the last piece of apple pie, they could agree that one of them would cut the piece of pie into two equal pieces, and the other would then choose one of the two pieces. This creative problem-solving technique encourages the cutter to be as accurate as possible in cutting down the center line of the piece of pie. If the cutter does not cut accurately, it will be to her detriment, because the chooser likely will choose the larger piece. The second origin of the pie-chart technique is from the vernacular of dispute resolution providers and users. Mediators and counsel often speak in terms of dividing pies in money-damages cases. This language represents a distributive method of bargaining, as opposed to an integrative method which seeks to expand the pie. The Creo Pie Chart technique combines concepts of accurate division of a liability pie together with the goal of distributing liability (and therefore defendants' shares of responsibility to pay) according to the amount of their fault in causing the plaintiff(s) to sustain damages. The Creo Pie Chart technique works best when there are several defendants.

The first step is for someone (usually the mediator, though it could be an advocate in mediation) to explain how the pie-chart technique works; the second step is to determine whether all the parties want to engage in the pie-chart technique. In implementing the first step, the mediator explains that the individual plaintiffs and defendants would each work separately and confidentially with their individual lawyers. Their individual goals would be to draw a pie (a circle) and then draw slices of the pie representing the amount of liability (fault) that should be attributed to the individual defendants. The parties would indicate on each slice of the pie chart the percent of liability (fault) being ascribed to each defendant. Each defendant would also estimate its own portion of liability. No party, plaintiff or defendant, would be aware of the apportionments drawn by the other parties. The mediator then would collect the pie charts and calculate the average percent of fault, based on each party's separate perception of each defendant's individual liability. A large pie chart would be displayed to the group indicating these averaged percentages of defendants' fault. Then the mediator would caucus with each of the defendants separately to determine whether each believed that the percentage of fault assigned to each was a fair estimate. The mediator would continue to caucus with the defendants until agreement was reached, and ultimately with the plaintiff(s).

I have used this technique effectively in a construction dispute that I co-mediated with Cheryl I. Niro of the law firm of Quinlan and Carroll. The dispute involved a building-owner plaintiff and approximately seventeen defendants, including construction contractors, subcontractors, and insurance-company defendants.

Blind Bidding with Conditions

Another impasse-breaking technique is Blind Bidding with Conditions. There are many types of blind-bidding variations, some of which are described by U.S. Magistrate Judge Morton Denlow in a reprinted article appearing in Chapter 5 of the *Creative Problem Solver's Handbook for Negotiators and Mediators*. This technique works effectively in a two-party dispute (or in a multi-party dispute where the separate group of parties (plaintiffs and/or defendants) must agree to propose or to accept a global amount in settlement. The

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REFLECTIONS FROM THE EDGE

ETHICS: THE GOOD, THE BAD, AND THE UNEXPECTED

By Kay Elliott*

(Note from the Chair of the Newsletter Editorial Board: This article is the first in a series, entitled "Reflections from the Edge," to be written by Kay Elliott. In this series, Kay will review the latest research and literature in the interdisciplinary field of dispute resolution, and she will explore possible applications of the research and literature to everyday practice.)

Any discussion of ethics for attorneys, in the role of mediator, advocate, collaborative lawyer, or negotiator, must begin with a few definitions and core concepts to frame the dialogue. Are ethics individually or socially defined? What penalties attach for making the wrong ethical decisions? What tests do we use when making ethical decisions? What or whom should we consult before making ethical decisions? Should we go within ourselves, instead of consulting laws or experts? These are just a few of the questions attorneys should answer, or at least consider.

The key to understanding ethics lies in the distinction between socially defined ethical rules and the personal ethical rules that individuals use when making ethical decisions. While, as an attorney, you might look to the Texas Disciplinary Rules for guidance, in the end you will also use some other test for your decision in a personal ethical dilemma. There is the "mirror test" - how will I feel about myself at the end of the day? The "video test" - if my mother, child, spouse, or spiritual guru saw me doing this, what would they think? While you might not get in trouble with a client or the grievance committee for a particular malfeasance or nonfeasance, ethical decisions are individually, not just externally, focused.

For mediators and mediation advocates, there are special ethical rules for guidance. In Texas, for example, there are two sets of rules, with almost the same wording, the Ethical Guidelines for Mediators, promulgated by the Supreme Court of Texas, and the Texas Rules of Ethics for Mediations and Mediators, enforced by the Texas Mediator Credentialing Association grievance procedure. The revised Model Standards of Conduct for Mediators, adopted by the ABA House of Delegates on August 9, 2005, furnish other standards for ethical decisions. Attorneys have Disciplinary Rules (prescriptive) enforced by the State Bar of Texas grievance committee, and the Ethical Guidelines for Settlement Negotiations (aspirational) promulgated by the Litigation Section of the American Bar Association in 2002. Collaborative lawyers have a different set of protocols and practices intended to promote the most efficient and ethical process. Even though mediators and mediation advocates have Ethical Rules and Guidelines, personal choices of ethical behavior and best practices are still difficult in practice, and few cases exist to guide us.

In many dispute resolution processes, there are ethical dilemmas: situations in which decisions over competing courses of action - whether in client counseling, negotiation, or advocacy - raise questions of personal moral judgment over appropriate professional response. When dispute resolution processes are developing, there can be a tendency to respond to ethical concerns by minimizing the new and complex practice choices that practitioners face. The opposite attitude is needed if the use of ADR processes is to continue to grow and gain acceptance. Mediators and mediation advocates face ethical challenges for which there are no clear answers. One goal of this paper is to provide an inner compass that points in the direction of the *best* ethical practices consistent with optimal outcomes.

In a recent presentation (TAM Conference, February 24, 25, 2006), Professor Carrie Menkel-Meadow offered several scenarios for the consideration of the mediators and advocates in the audience. In each case, the members of the audience were asked to decide whether they would disclose, say nothing, or lie, as a party or party representative - not as a mediator. In one case, the owner of a piece of beautiful, bucolic, serene acreage decides to sell, knowing that a motorcycle track is soon to be built next door. You are the seller. You have three choices: (1) offer the property at the highest possible market price and never say anything about the planned development next door; (2) make a full disclosure of the planned motorcycle track up front and ask for a more conservative price; or (3) offer the property at a reasonable price, and if asked questions such as "Why would you ever want to sell such a beautiful piece of property?" respond, "You know, I have been thinking of that, and I may take it off the market." Before reading further, decide what would you do.

In repeated workshops with lawyers, law students, business students, and consumer groups, diverse answers are given. Lawyers and law students tend to be concerned about the dangers of non-disclosure when the local law requires sellers of real estate to disclose, and they tend to choose answer (2) more often than other answers. Business students tend to be the most aggressive, preferring answers (1) or (3) - getting the highest price for the property. Consumer groups are less predictable.

In one recent survey, readers of *U.S. News and World Report* were asked "Who is going to heaven?" Four choices were given.

	Yes
Bill Clinton	50%
Michael Jordan	62%
Mother Theresa	79%
Me	82%

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What does this information tell us about ourselves? We don't think anyone is as good, as ethical, as we are! This method of thinking produces a downward spiral: I behave worse because I don't think you are as good as I am. If I expected that you would always tell the whole truth, make full disclosure, then I would be more inclined to do the same. If you are worse than I am, I must protect myself from your anticipated defections from the truth. One researcher, Robert Axelrod, in an article on the evolution of cooperation based on repeated computer simulations of the Prisoner's Dilemma, concluded that the answer is a strategy called "tit for tat." In a tit-for-tat strategy, I behave ethically until I catch you behaving unethically. I punish you for your defection, but only once, and then I go back to cooperating. I am fair but forgiving.

Most of us want to be thought of as trustworthy. Cooperative negotiators build a reputation for that quality. Competitive negotiators believe that everyone else is also competitive, thus they must not trust and they may as well use the tactics that give them power. Thus begins the dilemma: zealous, even aggressive, advocacy (attack dog), wary, suspicious behavior (watch dog), or careful, trusting guardian of the client's rights (guard dog)? How to be fair and also effective - that is the challenge.

In mediation, self-determination of the parties and their attorneys is a cornerstone. The negotiation strategies of each side are facilitated by the mediator to help the parties find the best possible outcome, but only if that outcome lies within the bargaining zones of the parties. Those bargaining zones are limited by each party's reservation point (RP), a key factor in negotiation planning. If mediation does not achieve a settlement, there are other ways to reach a decision. Sometimes that means asking for an opinion from a neutral; sometimes it means submitting the question to an adjudicator, such as a special master, arbitrator, or private judge. And if all else fails, we usually can go to litigation. It is sometimes hard to know and to choose the most ethical practice, whether as mediators, negotiators, or advocates, because the law is sometimes unclear and our Rules of Professional Responsibility and Disciplinary Rules do not answer some of the specific questions that arise. Even when they do, it is tempting to gain an advantage in an important case by using less than the most ethical behavior if there is no external punishment. The question then becomes, why should we behave ethically in all situations?

It is helpful to sort the situations into categories, then look at what the law, the contract, or the rules say before trying to match those answers, or attempted answers, with our different roles as neutral, collaborative lawyer, negotiator, or mediation advocate.[1] The following chart will help with the sorting process:

LACK OF CANDOR

1. ACTIVE MISREPRESENTATION		2. NONPDISCLOSURE	
A. SUBJECT MATTER	**B. SPEAKER'S EVALUATION**	**A. SUBJECT MATTER**	**B. SPEAKER'S EVALUATION**

The first category (1A), active misrepresentation about the subject matter, is arguably the most problematic and the most likely to run afoul of statutory or common law.[2] Usually these lies are made by prospective sellers, who have more information about the subject matter than the prospective buyers. In terms of negotiation, this misrepresentation is the most problematic because it tends to cause a buyer to increase his RP, causing an inefficient transaction. If the lie is not material, or if the listener does not rely on it, there is generally no violation of law, though the behavior is unacceptable in terms of ethical best practices.

When the attorney is serving as a neutral (mediator, evaluator, facilitator), knowledge of the active misrepresentation poses an ethical dilemma: whether to recuse oneself from the fraudulent transaction, insisting that the lying party tell the truth to the other side, or to continue to serve while urging the liar to tell the truth in the interest of an efficient bargaining process and an outcome that will be enforceable.

The difficult question is, what constitutes justifiable reliance? Courts usually find opinions are not actionable because a reasonable listener does not give the opinions credibility - relegating them to "seller's talk."[3] Courts also say buyers should make their own estimations of value rather than believe what obviously biased sellers are asserting. The general norms of bargaining prevail - if the statement is not the type that a listener would take seriously, it is not actionable. In an environment of complete candor, such as collaborative law, the general norms of bargaining do not control. Perhaps that is why collaborative law is growing. Only by private ordering (contract) or statute (collaborative law) can we create the most ethical negotiation behavior: the standard everyone else should, but often does not, aspire to.

Statements of opinion can be actionable under certain circumstances, such as when the opinion suggests a knowledge of facts to which the speaker has superior access.[4] The courts also have found that statements of opinion are actionable when the speaker's training or experience gives her a better ability to interpret the facts. Since it is always reasonable to rely on statements of fact, statements that clearly relate to facts and not opinions are most likely to be found actionable. Lying about either, however, may cause buyers to raise their walk-away number, and factual statements can be more easily verified than opinions. Thus, in an environment of trust and candor, such as the collaborative environment, neither behavior is appropriate or acceptable. If a mediator knows such statements to be false, there is no duty to carry the statement to the other side, but there is a duty to keep such lies confidential

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should the listener later seek to impeach the speaker with statements made in joint session.

Generally then, lack of candor in category 1A is the most dangerous for the speaker. It can cause an inefficient transaction, and it is clearly incompatible with the collaborative law or mediation scenario. Substantive law is in some ways broader and yet narrower than the rules of professional responsibility. Under the substantive law of contracts, for example, a misrepresentation of a material fact can be grounds for the rescission of a contract even if the speaker did not know the statement was untrue. Under Model Rule 4.1, however, a misrepresentation must be "knowing" to result in discipline of the attorney. Model Rule 4.1 is violated routinely by lawyers in traditional negotiation settings, yet the number of published opinions sanctioning lawyers for lying to negotiating opponents is minute. Will future clients prefer to behave ethically for the long-term benefits of the relationship rather than resort to the law of tooth and claw? Is external punishment the most effective way to encourage ethical behavior? Is collaborative law itself a manifestation of a preference, not only by clients, but also by attorneys? Ideally, we should not have to create an entirely new set of codified rules to achieve ethical, fair treatment in the settlement of cases, yet we have done so for family cases.

What happens in category 1B, when the speaker lies about his RP? Whether it is because this kind of untruth is expected as part of the negotiation dance, or that no inefficiencies occur as a result of it, it is almost universally true that misrepresentations about the *value* of the subject matter are not actionable. The Model Rules are clear on this point in providing that such untruths are not considered material. In an ideal collaborative environment, it would be unethical to exaggerate the value of an item in dispute to raise either its price or alter the perception of the listener to provide opportunities for valuable trade-offs. Rather than trust the other side, a neutral expert can be brought in to ascertain the true market value of an item, but there will still be opportunities for gaining leverage to obtain more value. In fact, could an attorney be accused of lack of zeal or diligence if no strategies are employed to maximize gain for one side even though the final outcome is optimal for both? Is winning so much a part of our human nature that we will always have ethical dilemmas? The social role of the attorney has been that of the warrior. Will the new role, with mediation and collaborative problem solving growing in use, be expert problem solver and strategist?

In the mediation environment, usually the best alternative to a negotiated agreement (BATNA) is presumed to be the trial, whereas in collaborative law there is no trial unless the parties begin anew with different attorneys. What effect does this have on the estimation of the RP? Is it even possible to lie about the BATNA in such an environment? For category 1B, the opportunities for lack of candor are many and the punishments few. However, this category may offer the best explanation for the allure of collaborative law: in an environment of no litigation, neutral experts, contractual obligations to make full disclosure, and strong incentives to use the process for problem solving rather than for individual gain, energy can be focused on integrative negotiation. In this atmosphere, parties are empowered to look at the long-term gains for both rather than the short-term gains for either.

Moving into categories 2A and 2B, we see the other side of bad faith: silence about the subject matter or about the value of it. Many negotiators believe that if you are not lying, you are not committing fraud. The courts do not always agree. It is true that many non-disclosures are permissible except in certain circumstances, but one of those circumstances is "when standards of fair dealing require disclosure." The vagueness of that exception complicates any application or understanding of the rule. In the example given above, should the seller of the bucolic property disclose the planned motorcycle track? Does this duty to disclose arise only when a local law requires it? What if the house in question is infested by termites or roaches? Courts are divided on whether the owner, who is in the best position to know this fact, must disclose it. What if the house has a reputation for being haunted? In one New York case,[5] the court ruled the seller had an obligation to disclose that fact because the buyer could not bring a conjurer along with a termite inspector on the home inspection! There is no duty to disclose the reservation point in a negotiation, mediation, or collaborative case. In terms of diligence and ethics, 2B is the one clear branch of the lack of candor issue.

Now let us look at a not-so-hypothetical example of what could happen in a company acquisition. The corporate executives of Robotics, Inc., are negotiating to acquire Peach Plasma. The newest product line of Peach Plasma, a nifty, small, hand-held computer/boom box/telephone/digital assistant/camera, has seen tremendous sales since its introduction into the marketplace three months ago. The sales have boosted the share price, the overall goodwill of the company, and the value of the patent. Recently, unknown to Robotics, product defects and quality-control issues have surfaced that, if disclosed, would drive down the acquisition price of Peach Plasma. A decision is made by Peach Plasma executives not to disclose this problem. Is the non-disclosure material? If the buyer later discovers the problem and the share price plummets, does the buyer have the right to rescind the acquisition or to go back to the bargaining table to improve the terms of the merger? If this situation looks familiar, it is loosely taken from the script of DISCLOSURE, a movie in which corporate executives actively colluded to distract everyone from the problems with the product until after the merger transaction was completed?

In our case, one day after the acquisition documents are signed, a disgruntled former Vice President of Peach Plasma blows the whistle by contacting a reporter from the Atlanta Constitution. The share price of Peach Plasma takes a nosedive.

Client dishonesty puts an attorney in a delicate and precarious position. Suppose the counsel now representing

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ADR Section Calendar 2006

As a member of the ADR Section, you are always cordially invited to attend any of the quarterly Council meetings. We ask that as many members as can try to attend the annual meeting each year that is held in conjunction with the State Bar Annual Meeting. This year, it will be in Austin. Please note our calendar:

Council Meetings

June 16, 2006
2:30 p.m.—4:30 p.m. State Bar Annual Meeting—Austin

General ADR Section Meeting

June 16, 2006
10:00 a.m.—2:00 p.m. State Bar Annual Meeting—Austin

October 2006
9:00 a.m.—3:00 p.m. Location to be Determined

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Peach Plasma in a mediation process concerning the possible rescission of the agreement knows of the deliberate concealment. What should she do? On the one hand, the attorney has the duty to represent the client diligently and to preserve attorney-client confidentiality, particularly in the area of intellectual property assets. On the other hand, the attorney is an officer of the court.

Under Texas Disciplinary Rule 3.03, an attorney has a duty of candor toward a tribunal, and by definition in the "Terminology" section of the Rules, a mediator is a tribunal. The attorney may not lie to the mediator, nor can she permit her client to lie to the mediator. Let us suppose that the client is convinced that he cannot lie to the mediator, and should tell the mediator of what was withheld in the original negotiation. The mediator is then told by the client and the attorney about the concealment, but is told not to disclose it to Robotics.

This leaves us two questions. What should you as the attorney for Peach Plasma do? The attorney should surely attempt to get Peach Plasma to disclose completely. If Peach Plasma refuses, the attorney should withdraw from the representation. The attorney should disclose the information to Robotics if it is necessary to avoid making her a party to knowingly assisting a fraud perpetrated by Peach Plasma. What should the mediator do? The initial response would probably be, "Don't tell Robotics." Perhaps a bit strange, since we have seen that Peach Plasma's own attorney probably should disclose. The mediator should surely have a caucus with the lawyer, find out when the lawyer learned of the situation and what the lawyer intends to do about it. If the lawyer convinces Peach Plasma to disclose to Robotics, the mediation can go on. If Peach Plasma still refuses, the mediator should ask the lawyer if she intends to do her duty. If she does, the mediation is effectively over. If the lawyer says she is not going to do anything, the mediator should at least recuse himself from the mediation. Mediators do not knowingly facilitate fraudulent agreements.

A Texas professional Ethics Committee opinion has examined a similar obligation. The attorney requesting the opinion had defended a debtor against an involuntary bankruptcy petition. Six months after the bankruptcy court denied the petition, the creditor filed a motion for relief from the denial. When the debtor consulted the attorney about filing a response to the motion, the attorney learned facts that, in the attorney's opinion, might have changed the court's original decision. The attorney declined to represent the debtor and questioned whether she had an obligation to reveal the new facts to the bankruptcy court. The committee opined that she had such an obligation, even if her good-faith efforts to persuade the former client to authorize her to do so failed.[6] Furthermore, under Rule 1.05(f) a lawyer "shall reveal confidential information when required to do so by Rule 3.03(b)."

Under traditional rules of negotiation and under professional responsibility rules, Peach Plasma should start with an apology for the previous nondisclosure, lay out the entire issue of the product's problems, find a solution for those problems with Robotics' help, and renegotiate the terms of the merger along the lines of a short-term profit loss but long-term positive outcomes for the company as it continues to market this product and put out new product lines. Honesty can turn this dispute into a new, better deal; ethics can be profitable.

**** Kay Elliott** is an attorney, mediator, and adjunct professor of law. She is also co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003) and a Credentialed Distinguished Mediator.*

ENDNOTES

1. Russell Korobkin, Negotiation Theory and Strategy, Chapter 13 and discussion in accompanying instructor's materials (Aspen Law & Business, 2002).
2. Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853 (2d Cir. 1918).
3. *Id.*
4. Kabatchnick v. Hanover-Elm Building Corp., 103 N.E.2d 692 (Mass. 1952).
5. Stambovsky v. Ackley, 572 N.Y.S.2d 672 (App.Div. 1991).
6. Texas Commn on Professional Ethics, Op. 480, 56 Tex. B.J. 705 (1993).

Civil Collaborative Lawyers

*By Sherrie R. Abney**

(Note from the Chair of the Newsletter Editorial Board: This article begins a new series whose purpose is to expose our readers to perspectives on Collaborative Law. If you would like to contribute an article about Collaborative Law, please contact Sherrie Abney at SAbney913@aol.com or Walter A. Wright at ww05@txstate.edu)

When Collaborative Law began, it was a concept that had no actual basis in the law. The basis for the collaborative process is found in the desire of a number of attorneys to resume the status of agents, healers, and counselors in their communities— positions that many lawyers held some years ago. Today, in the United States, it is not likely that most average citizens would describe attorneys as counselors, and it is highly unlikely that the average citizen would describe any attorney as a healer.

What happened to the practice of law that has caused the role of attorneys to change? Why has the practice of law evolved into a game that allows parties and their lawyers to ignore equity and fair dealing in favor of technicalities and arbitrary rules permitting clients and their attorneys to tell half truths and hide evidence?

It is difficult to know exactly how and when this change took place because it happened over several decades. However, the two apparent explanations for the evolution of the role of lawyers in litigation are greed and power. Lawyers discovered that they could hide behind their profession and charge for many unnecessary services that they self-righteously claimed were necessary to protect the interests of their clients. Clients accepted the game because this flurry of activity meant that the attorneys were attempting to discover every possible statute, case law, and loophole that would empower their clients to "win."

Winning at any cost has become the mantra of many litigants and their lawyers. Clients are billed for discovery that yields little, if any, evidence that is admissible in court. Many hours are spent in depositions asking questions totally irrelevant to the dispute. Some lawyers will explain that the irrelevant questions are used to "warm up" the persons being deposed, so they will be caught off guard and make admissions against self-interests or inadvertently supply information that will bolster the deposing attorneys' case strategy. Oft times the parties being deposed are able to learn as much about the deposing attorneys' tactics as the deposing attorneys are able to learn about the witnesses. Thus, the deposed parties are better able to fend off the opposition if they do, in fact, go to trial—which is an event that usually doesn't happen.

Litigation attorneys are always looking for ways to gain an edge on the opposition. They may attempt this by trying to "psych out" the opposition, intimidate the other parties or their attorneys, or use every electronic gadget available to dazzle the jury. The use of all sorts of graphs, charts, power points, slides, videos, and enlarged photographs by litigation attorneys to illustrate their arguments to juries has become a "necessity" for big cases. This practice is not only used to demonstrate the alleged facts of the case; the audiovisual aides also are used to put a spin on evidence that is sometimes more inflammatory than factual. In response to the electronically enhanced approach to litigation, businesses have sprung up for the sole purpose of trial-exhibit preparation.

In some parts of the country, videos are prepared for child custody cases to illustrate "a day in the life of the child." The purpose of the videos is to convince juries that it is in the best interest of the child, the subject of the suit, to give custody to the parent who is featured with the child in the video. The video is represented to the court as being a completely unbiased illustration of the child's activities on an average day. How many jurors are going to believe that? Apparently a few have.

It makes no difference that less than two percent of all cases ever go to trial. Trial attorneys prepare as though every case is going to trial because "this" case might be one of the less than two percent that does not settle and makes it to trial. Clients are generally told, "We will try to settle, but if that doesn't happen, we have to be ready." This is a true statement for cases that are litigated. Litigation attorneys are always about the schizophrenic task of being peacemakers and warriors at the same time. Consequently, the most honest, conservative, concerned litigator must prepare for trial despite the fact that he is making a good-faith effort to settle. The need for trial preparation cannot be questioned. What can be questioned is the extent of some attorneys' preparation.

When clients can afford to pay the price, extensive preparation too often becomes necessary. The philosophy that discovery limits are proportionate to the size of the clients' pocketbooks or the defendants' deep pockets gives attorneys license to take the discovery process to the limits of the budget in each case. In large corporate disputes, discovery can, and often does, cost tens of millions of dollars.

If one side decides that expert testimony is needed, the other side is going to need an expert to discredit the first expert's testimony and so on. Attorneys are not going to hire experts that do not agree with their clients' positions, so it does not take much thought to figure out that trials are the last place juries will hear fair and objective expert opinions. In addition, the cost of these hired guns can be outrageous. There are times when the experts, who compile their reports and testify for a few hours at

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most, are paid as much as the attorneys who work the entire case for months or even years.

There are necessary, legitimate reasons to use discovery, but any judge will tell you that much of the discovery that is actually propounded in litigation is unnecessary and/or abusive. Necessary or unnecessary, reasonable or abusive, the clients must pay for it. In the heat of battle, clients may feel that they have no choice but to charge into the fray of discovery with checkbooks in hand.

If the client is a party to one of the approximately 98.6% of the cases that settle, much of the discovery and all of the trial preparation is worthless. If the client is one of the approximately 1.4% that actually goes to trial, the client at that point gives up all control over the outcome of the case. The judge and/or jury become the decision-makers. If the client doesn't like the decision and is able to find points of error, the client may appeal and continue the battle still relying on others to make all of the decisions.

So how does Collaborative Law, also known as the collaborative process, fit into the litigation picture? Actually, the collaborative process does not fit into the litigation picture. Collaborative Law exists in a world outside the courtroom and away from the spotlight. The participants in the collaborative process quietly work behind closed doors in private conference rooms.

Litigation and the collaborative process are both methods of resolving disputes which result in enforceable court orders. The similarity ends there. Everything that is done to achieve resolution is done differently in each process. The fact that litigation is very dissimilar to Collaborative Law should not be taken as an indictment that all litigation is "bad." There are some disputes and some parties that are simply not appropriate for the collaborative process. Disputes that involve parties or facts that do not fit the collaborative profile must be resolved in some other manner. Litigation may be the best way, and at times the only way, that resolution of some disputes can occur.

Collaborative Law will never completely replace litigation, nor should it. People have a right to their day in court if that is what they choose. People also have the right to settle their cases much more quickly and economically in the collaborative process if that is what they prefer. For these reasons, the public should be educated about Collaborative Law and consider the collaborative process as the first option to settle their disputes. If it is not a viable choice for the dispute, the parties can move forward to one of any number of other dispute resolution processes, including litigation.

Collaborative Law is a form of what is commonly known as alternative dispute resolution or ADR. One of the primary differences in Collaborative Law and other forms of ADR procedures is that Collaborative Law does not rely on a third-party neutral. Mediation, arbitration, summary jury trial, and mini trial all rely on a third party to facilitate the process or to decide the outcome for the parties. The collaborative process does not rely on a third party. The parties and their attorneys will schedule and implement the process. If they reach an impasse, they may employ the assistance of a mediator or arbitrator, but barring impasse and/or the need for expert assistance, the parties and their lawyers are the only persons present during the collaborative process.

Many litigation attorneys are strictly opposed to Collaborative Law and will not discuss it with their clients. One might ask, "Is this fair and ethical?" If a physician had a cure for an illness and refused to share his cure with the public because it would reduce the income he received from treating people who had the illness, the physician would commit an unconscionable act. If an attorney has information regarding a way to "cure" some disputes and is able to assist clients in avoiding the expense and agony of litigation, should that attorney have the duty to tell this to clients? Many attorneys will claim that they do not have the duty to disclose this information. They may give many reasons, but the real answer for most is they do not want to give up the income they can derive from cases that are litigated.

Alberta, Canada has passed legislation requiring family attorneys to disclose information about the collaborative process to every client that they represent. Because disputes belong to the clients, the choice of how their cases are handled should be the clients' choice, not the attorneys'; however, clients are unable to exercise their right to make a choice if they are unaware that right exists. Several communities in Alberta have seen their family court dockets reduced as much as 85% since clients have learned that the collaborative option is available. It is conceivable that at some point in the future, failure to inform clients of the collaborative process will be considered malpractice in the United States as well.

Litigation v. The Collaborative Process
Litigation begins when someone files a petition in state court or a complaint in federal court. The papers are delivered or served by third parties, known as a process servers or constables, on the defendants or respondents. After the defendants are served, they must file an answer with the court within a specified period, usually about three weeks. If the defendants do not file a timely answer, they are in default, and the plaintiffs can obtain a judgment against them.

In the collaborative process, entering disputes into the records of the court may occur in the same manner as litigation, by filing a petition that requires an answer, or it may occur much differently. The ideal way to approach the court in the collaborative process is for the parties to settle their dispute prior to filing any papers. Once the parties have an agreed settlement, they file a joint petition in the court having jurisdiction over the dispute and set a hearing to request the court to confirm their agreement, which has been set out in a final order. This method enables the parties to utilize a joint petition that merely states that the parties have a dispute, and they have jointly agreed to settle the dispute privately. This approach prevents anyone who is not a party to the case from knowing the exact nature of the dispute. It also eliminates the inflammatory allegations that are generally contained in Plaintiffs' Original

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Petitions; thus, defendants are not notified of the pending litigation by way of a surprise attack filled with adversarial language that relies on blame rather than resolution.

If the parties have not filed the case or begun to resolve any of the issues in their dispute, the plaintiffs may write a letter requesting that the defendants consider pursuing resolution through the collaborative process. Depending on the dispute and the parties, plaintiffs may wish to include an original petition setting out all of the plaintiffs' allegations and stating that should the defendants not agree to the collaborative process, the enclosed pleading will be filed with the court. This tactic should not be used as a bluff or an idle threat, but as an indication of what will definitely happen should the defendants choose not to agree to the collaborative process. If defendants decide against the collaborative process, the plaintiffs will only harm their credibility if they do not file the petition that has been sent to the defendants.

In some situations, it may be necessary for the plaintiffs to file the case with the court prior to contacting the defendants. This would occur when statutes of limitations are about to run or when the plaintiffs feel it necessary to request a temporary restraining order (TRO) to protect the parties or their property. In that event, the case may be filed and a letter prepared to accompany the papers that the constable serves on the defendants. The letter will indicate that the plaintiffs wish to make the resolution of the dispute as amicable as possible and request the defendants to consider the use of the collaborative process.

On the other hand, defendants to the dispute may be the parties who suggest the collaborative process to the plaintiffs. Whether the collaborative process is initiated by plaintiffs or defendants makes no difference. What does make a difference is that all parties and attorneys must agree to the collaborative process. The process will not succeed if all parties have not voluntarily agreed to participate. The courts may order parties to appear at mediation, but they cannot order a party to participate in the collaborative process.

The entire collaborative process depends upon the voluntary commitment of each participant to proceed in honesty and good faith. It is impossible to order honesty and good faith; therefore, it would be useless to attempt to conduct the collaborative process with anyone who did not want to participate. In addition, even if a person was coerced into the process, that person would be required to sign the participation agreement, which is an enforceable contract. If an individual is ordered by the court to sign the participation agreement and is later sued for breach of contract, that participant can make a reasonable argument that the contract is unenforceable because it was not entered into voluntarily. No collaborative lawyer or party who has any true understanding of the process would agree to go forward with an unwilling or court-ordered participant. That is why courts that encourage the collaborative process are requiring that attorneys be trained in Collaborative Law and why legislation is needed to guarantee that attorneys are trained and that they provide proper disclosure to their clients.

Once the decision has been made to participate in Collaborative Law, the collaborative lawyers will plan the agenda for the first joint meeting. All joint meeting agendas are strictly followed and no item is discussed that is not listed on the agenda unless the discussion is agreed to by all participants.

The first meeting includes the review and execution of the participation agreement. Next, the participants will address specific details such as: list of possible neutral experts; any persons other than participants who will be allowed to attend joint meetings; options to be considered if the parties reach an impasse, disclosure of outside legal opinions and consulting only experts, and any other matters that the parties believe should be agreed upon. These decisions will be recorded in an addendum to the participation agreement and signed by the parties and their lawyers.

The collaborative participants are now ready to consider their goals and interests. Each party will have an opportunity to discuss with all other parties how the dispute has impacted their lives and/or businesses and to list goals that they would like to see achieved through the process. As discussions continue, parties will often find that their goals and interests change as they gain a new understanding of the dispute by hearing the goals and interests of other parties. This seldom, if ever, happens in litigation where discussions focus on blame rather than the creation of communication or understanding.

When the parties' goals and interests have been explored as much as is needed to give the participants a good idea of the issues that must be addressed, the parties can begin to gather information. This process is a simple one. If someone asks for relevant information, the one who is asked must deliver it. If no one asks for it, but it is relevant to the dispute and one of the parties has it, the person in possession of that information must deliver it.

There is no formal discovery unless it is agreed to by all parties. Formal discovery should only occur in rare circumstances such as a brief deposition to preserve a witness's testimony when the parties know that the witness may not be available at a later time. If the participants discover that they are unable to agree on some fact or that they do not have the expertise to make an accurate determination about an issue in the dispute, they can employ a mutually agreed-upon neutral expert to supply the missing information.

Copies of all information are distributed to all participants as it is assembled. Everyone should keep an open mind and continue to gather information until each party is satisfied that enough data has been obtained to enable all of the parties to develop reasonable and informed options.

As the parties begin to formulate options, it is extremely important to record all suggestions and ideas and give each careful consideration. An option that seems impractical at first may later be found to be the best solution. Keep in mind that many attorneys who now promote the collaborative process cried "Nonsense!" the first time they heard about it. Moreover, no matter how unrealistic an option may appear to some of the participants, the party who suggested the option should not be slighted.

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If suggestions are truly impractical, the persons who suggest them will likely be the first to realize that they are unworkable and withdraw those options from consideration. It is best to allow the authors of the ideas time to realize their mistakes than to have them criticized by the other parties.

The task of discovering the best options will require some creative work on the part of the participants. Brainstorming is one of the best methods participants can use to develop creative options, but optimum results from brainstorming do not occur between aggressive adversaries. Few people can envision creative settlement options when everyone around them is making threats and demands. The absence of the adversarial atmosphere is exactly why the collaborative dispute that is on track can provide the ideal environment to safely play the "what if" game— otherwise known as brainstorming.

When it appears that all options have been listed, it is time to evaluate each one and seek solutions that are agreeable to the parties. No one is going to "win," but neither is anyone going to "lose." No decision is made on any issue without the participation, consent and full knowledge of the parties. Once the parties' agreement is reduced to writing, it may be entered with the court. Although the chance of parties getting all they wanted in the collaborative process is not likely, chances of parties preserving ongoing relationships, saving time and money, and keeping control of the dispute are very likely. The likelihood of these advantages happening in litigation is slim. A chance of a big "win" is possible in litigation, but if there is a big win, a chance of an appeal to a higher court is almost always guaranteed.

It is the duty of all attorneys to explain the advantages and disadvantages of litigation and other dispute resolution processes. The parties can gain some genuine advantages in each process. While collaborative law will usually save time, money, and relationships, the parties risk having to hire another attorney if they fail in the process. Moreover, they are temporarily giving up their right to have formal discovery and court intervention. Some clients see this as an obstacle to participating in the collaborative process. Many others do not. If attorneys do not prefer to use the collaborative process, that is their right, but the attorneys' decision should not affect the ability of the clients to select the method of dispute resolution that they prefer.

The single most important obstacle for the collaborative lawyer to overcome is something called a paradigm shift. This requires the attorneys' brains to be "rewired," so they can begin to think 180 degrees opposite the litigation mode. Occasionally, litigators will hear about the process and immediately understand the paradigm shift. Others will say the collaborative process is "utter nonsense." A number of the attorneys who summarily dismissed Collaborative Law when they first heard about it have come to see what the process can do for clients and are now collaborative lawyers or agree that there are cases that should be done collaboratively. There are other attorneys who, for whatever reason, simply do not like the process, and still others that are just not able to make the paradigm shift and overcome being adversarial long enough to learn what Collaborative Law can do.

A simple example illustrates the paradigm shift that takes place when one goes from litigation to the collaborative process. Two parties have a dispute that is being litigated. They, with the aid of their attorneys, reach an agreement; thus, they avoid going to trial. The plaintiff's attorney drafts the final order that will be entered with the court and sends the order to the defendant's lawyer. The order has been signed by the plaintiff and the plaintiff's attorney. The letter accompanying the order asks the defendant's lawyer to sign the order, have the order signed by the defendant, and entered it into the records of the court.

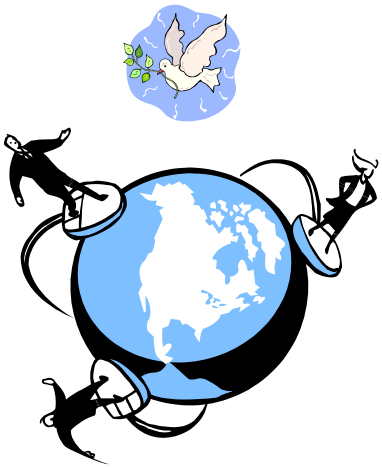
Upon examining the order, the defendant's attorney notices that although his client legally owes a debt and has in fact promised to pay the debt as part of the settlement agreement, the order is drafted in a manner that makes the language obligating payment of the debt unenforceable. In traditional litigation, the lawyer discovering the mistake cannot bring the error to the attention of opposing counsel without inviting his client to sue him for malpractice or at least file a grievance against him. However, in a collaborative case, lawyers contract to correct all mistakes; consequently, the lawyer discovering the error would have a contractual and ethical obligation to inform the drafting attorney of the error and assist her in getting a properly drafted order prepared and entered with the court.

Question? Once the parties have negotiated an agreement, is it fair to have the terms of the agreement that was the basis for their negotiated settlement set aside due to an error in the final order? Fair is not always present in litigation, while the collaborative process relies on it. This is only one example of the many differences between Collaborative Law and litigation.

Many attorneys have concluded that they cannot continue to practice law in the manner which has become the "norm" in the United States. This evolution back to counselors, agents, and healers began with family lawyers and has spread into other areas of civil law. As the public learns about the collaborative process, the process will continue to grow and adjust to society's needs. Hopefully, this adjustment will return more civil attorneys to their original roles of agents, healers, and counselors.

**** Sherrie R. Abney*** *has practiced law in Texas since 1990 in the areas of family law, real estate, and mediation. Currently, her focus is Civil Collaborative Law. Sherrie is Co-founder and Vice President of the Texas Collaborative Law Council and plans and participates in their two-day trainings held in the spring and fall. Sherrie began the Collaborative Law Study Group at the Dallas Bar Association and served as chair in 2005. She has also authored Avoiding Litigation: A Guide to Civil Collaborative Law, which is available through Trafford Publishing at www.Trafford.com.*

ADR on the Web



American Arbitration Association

http://www.adr.org

Reviewed by Mary Thompson*

\Founded in 1926, the American Arbitration Association (AAA) has offices in the U.S. and around the world offering training, education, and services in arbitration, mediation, and other ADR techniques.

A review of the major areas of the web site shows the scope of available content:

Focus Areas includes topics such as Commercial, Disaster Recovery, Domain Name Disputes, Energy, Health Care, and 18 additional areas of practice. A visit to the "Employment" link, for example, shows a list of (mostly, but not always) relevant

- Rules and Procedures
- Forms
- Guides and Protocols
- Fact Sheets

Rules and Procedures is also the name of another major area on the web site. It offers a comprehensive listing of the information found elsewhere on the site, but is a good place to hunt for an impressive range of ADR resources. Examples include:

- *Resolving Employment Disputes: A Practical Guide*
- *A Guide to the Management of Large Complex Cases*
- *A Code of Ethics for Arbitrators in Commercial Disputes*

The content in this section provides information not only for practitioners but for consumers and provider organizations as well.

Press Room provides a link to Adrworld.com, which offers up-to-date information (literally - it appears to be updated daily) on ADR court opinions, legislation and regulatory changes from across the United States. Although a brief abstract provides basic information on each case, it appears that a subscription is required to access complete articles.

Education includes links to, among other things, a variety of state ADR statutes, which could be valuable to practitioners who serve as neutrals or as instructors in multiple states.

Like many websites, this one has some problems with both its organization and functionality. Nevertheless, the AAA web site has some useful and substantive material for mediators, arbitrators, and other ADR practitioners

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**** Mary Thompson,*** *Corder/Thompson & Associates, is a mediator, facilitator, and trainer in Austin.*

If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com.

To reach peace, teach peace.

Pope John Paul II

UH LAW CENTER TEAM WINS ICC INTERNATIONAL MEDIATION COMPETITION

Two University of Houston Law Center students have earned top honors in the ICC International Commercial Mediation Competition in Paris, France.

The UH Law Center team of Jim Lawrence and Katherine Sands bested teams from 12 other law schools in Canada, France, Germany, the United Kingdom and the United States. Organized by the International Chamber of Commerce with the cooperation of the American Bar Association, the three-day competition concluded on January 18, 2006 at ICC headquarters in Paris.

"Winning this major international competition is a credit to these two remarkable students and their outstanding coaches. In a larger sense, their accomplishment speaks volumes about the strength of our Blakely Advocacy Institute under the direction of Peter Hoffman," said Nancy Rapoport, dean and professor of law at the UH Law Center.

Rapoport credited the contributions of UH Law Center alumni Jeff Abrams and Kevin Hedges, who served as coach and faculty advisor, respectively, for the ICC competition. UH Law Center Professor Tom Newhouse also traveled with the team.

The ICC International Commercial Mediation Competition required competitors to act as counsel and parties before professional mediators, and to use the ICC's alternative dispute resolution (ADR) rules to solve problems devised by a special drafting committee of mediation experts. The ICC ADR Rules were introduced in 2001 and offer a structured way of seeking a mutually agreed solution to a dispute.

The competition was organized by the ADR division of ICC's Dispute Resolution Services with the participation of professional mediators from twelve different countries. In addition to the first-place trophy, the UH Law Center was awarded an internship in ICC's Dispute Resolution Secretariat.

Professor Thomas C. Newhouse

From Left to Right: Jeff Abrams, Jim Lawrence, Katherine Sands, Kevin Hedges

AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW

By Sherrie R. Abney

Trafford Publishing, 2005,
www.trafford.com

Reviewed by Lawrence R. "Larry" Maxwell, Jr.*

In the United States, unlike in most other countries in the world, litigation is generally the first option for resolving civil disputes. Ms. Abney's book describes a new and innovative first option. The collaborative process is a voluntary, non-adversarial approach to resolving civil disputes, which enables parties to settle their disputes privately with fair and equitable results. The author emphasizes that the process is voluntary and cannot be court-ordered. Ms. Abney reminds us that everyone has a right to be adversarial, and people cannot be forced to proceed honestly and in good faith.

The collaborative process is widely used in family law matters in the United States, Canada, and England. Ms. Abney's book is the first book published on the subject demonstrating that the process can be applied to resolving many civil disputes with the same success the process is experiencing in family law matters. With her experience in family law, the author is uniquely qualified to demonstrate that the process can work "outside of the family box."

The author does a superb job of explaining the paradigm shift that is required in order for lawyers and clients to transition from the litigation "blame game" to resolving disputes by focusing on the parties' interests and goals, freely exchanging information, and developing and evaluating options to arrive at a fair settlement. The charts comparing litigation and collaboration in the Appendices are enlightening.

The book gives the reader case studies based on actual cases, including a blow-by-blow description of a federal court case involving a large national bank and several individuals, followed by a theoretical analysis of how the case would have played out if the parties had chosen to use the collaborative process.

If you are interested in the legislative process, you will be fascinated as the author describes the efforts of a group of lawyers to include a Collaborative Law Procedures bill in the Texas Civil Practices & Remedies Code. A copy of the bill is contained in the Appendices. We can only speculate as to why, for the past five years, trial lawyers have opposed a bill that will create uniformity throughout the state for a *voluntary dispute resolution process.*

For lawyers interested in incorporating Collaborative Law into their practices, the Appendices contain Protocols of Practice for Collaborative Lawyers, a Participation Agreement developed by the Texas Collaborative Law Council, and a list of Collaborative Law practice groups throughout the world.

This book is a must-read for every individual, family, business or organization that has ever been involved in a dispute, which includes just about all of us. As a lawyer who was involved in litigation for over forty years, I am working hard to make the paradigm shift. I believe the collaborative process is the business imperative of our time. The process captures the exponential power of cooperation.

Granted, some situations do arise when a final court order is necessary to end a dispute. However, we know that the most successful businesses and organizations are able to maintain relationships over the long run, which is not possible in the litigation "arms race." A dispute is a problem to be solved, not a battle to be won.

After reading Ms. Abney's book, you may discover that you have no interest in participating in the collaborative process because you cannot make that paradigm shift. But at least you will have an idea of how the process works, and you can use the information in dinner conversations. On the other hand, you may discover that you are a candidate for the collaborative process and are ready to be trained in the process.

**** Lawrence R. "Larry" Maxwell, Jr.** is an attorney, mediator, arbitrator and practitioner of collaborative law in Dallas. He is a co-founder and President of the Texas Collaborative Law Council, Inc., Vice-Chair of the newly established Collaborative Law Section, Past Chair of the ADR Section of the Dallas Bar Association, and a past President of the Association of Attorney-Mediators.*

ETHICAL PUZZLER

*by Suzanne Mann Duvall**

This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, and Office #214-361-0802 and Fax #214-368-7258.

You are an attorney and a mediator. Recently, you mediated a case in which you believe counsel committed a breach of legal ethics by representing two parties whose positions and interests were diametrically opposed (to the extent that settlement with one client would result in suit being filed by the payor against the other client to recover the settlement amount). The case did not settle; however, you remain concerned about the obvious conflicts of interest, so much so that you are conflicted yourself. As an attorney, you are aware of your ethical duties to the profession. As a mediator, you are aware of the ethical rules regarding the confidentiality of the mediation process. What, if anything, should you do?

W. Reed Leverton (El Paso): As presented, the attorney has obviously violated Disciplinary Rule 1.06 (b) (1) by representing two clients in the same matter wherein the clients' interests are "materially and directly adverse." Disciplinary Rule 8.03(a) requires an attorney to report a colleague's conduct when the witnessing attorney has knowledge that the other has violated a Rule, and further, that the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." On a subjective basis, one cannot be sure that the conduct in question meets the criteria for mandatory reporting. That said, comment 2 to rule 8.03 militates towards required reporting of the proscribed conduct. Moreover, although section 154.073(a) of the Texas Civil Practice and Remedies Code codifies the confidential nature of the mediation process, section 154.073(e) provides as follows: "If this section conflicts with other legal requirements for disclosure of communications, . . . the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether . . . the communications . . . are subject to disclosure." Assuming the matter is in litigation, it appears as if the mediator should take the matter up with the presiding court under section 154.073(e) to obtain a ruling one way or the other as to confidentiality. If the court finds that the conduct (as gleaned through communications) is not confidential under the Code, I am of the opinion that disclosure is required under the Disciplinary Rules.

Oddly, if the case is not in litigation, I would not report the conduct because the mediation occurred before litigation, which still places it within section 154.073(a), but outside of section 154.073(e) because there is no presiding judge to render a decision on the confidentiality issue.

Regardless of the above, I tend to be a "purist" when it comes to the confidential nature of mediation. Every breach of confidentiality makes it all the easier to do it again in the future, which in turn causes a deterioration of the process. I would have a very difficult time reporting the conduct in question and probably would have found a way to deal with it during the mediation itself.

Thomas. J. Smith (San Antonio): This Puzzler exposes a conflict between our State Bar Disciplinary Rules and the ADR Statute. Disciplinary Rule 8.03(a) provides that a lawyer shall inform the State Bar if the lawyer has knowledge of a disciplinary violation by another lawyer. Apparently, the State Bar is serious about this particular provision as it recently disciplined a young attorney in San Antonio for violating this particular rule. Section 154.053(c) of the ADR Statute states that conduct at a mediation is confidential and may not be disclosed by the mediator. So what is a mediator to do if he or she observes a clear violation of the Disciplinary rules by one of the attorneys at a mediation?

The two provisions of Texas law are obviously in conflict. Some mediation professionals feel that the mediator is a not a "lawyer" while participating in a mediation. I'm not sure I subscribe to this position. I think I'm subject to both the Disciplinary Rules and the ADR Rules when I'm conducting a mediation. I'm not sure whether the provisions of the Disciplinary Rules (adopted by the Supreme Court of Texas) or the ADR Statute (passed by the Texas Legislature) control. What is my greater duty: to protect the legal system or the mediation process?

I've experienced a similar situation during the course of one of my mediations. I came down on the side of non-disclosure, but I continue to be troubled by my decision. Yes, my decision protects the mediation process, but at what expense? People may be more apt to use me as a mediator if they are comfortable there is no possibility I'm going to report their conduct to the State Bar of Texas. But somehow I am not particularly proud of my decision.

A possible solution, which our group might push, would be to amend either the ADR Statute or the Disciplinary

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Ethical Puzzler
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Rules, to specifically state whether ethical violations should be reported by a mediator.

William B. Short, Jr. (Dallas): The fact pattern describes a perceived conflict of interest (presumably occurring in Texas) subject to the provisions and prohibitions of the Texas Disciplinary Rule 1.06(b)(1), which provides, in relevant part, "(b)…a lawyer shall not represent a person if the representation of that person: (1) Involves a substantially related matter in which the person's interests are materially and directly adverse to the interest of another client of the lawyer . . . ." However, the application of Rule 1.06 (b)(1) to the fact pattern must be considered with the exception of Rule 1.06(c), which qualifies the prohibition of (b)(1) as follows:

> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> (1)the lawyer reasonably believes the presentation of each client will not be materially affected; and
>
> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature implications, and possible adverse consequences of the common representation and the advantages involved, if any . . . .

If the attorney/mediator can determine that a reasonable basis for the application of the provisions of Rule 1.06(c) exists, then the attorney/mediator is probably not justified in considering further action in regard to the perceived conflict of interest. On the other hand, if the attorney/mediator cannot reasonably determine that the exception of Rule 1.06(c) applies to the perceived conflict of interest, then the attorney/mediator must further consider the provisions of Texas Disciplinary Rule of Professional Conduct 8.03(a), which provides, in relevant part, that:

> (a) [A] lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

But the mandate of Disciplinary Rule 8.03(a) then interplays with the statutory restrictions of Chapter 154 of the Texas Civil Practice and Remedies Code for a mediator who is an attorney. Section 154.023(a) defines the mediator as an impartial person. Section 154.053 (b) and (c) state:

> (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communication relating to the subject matter of the dispute.
>
> (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

Given the statutory prohibitions of Section 154.053(b) and (c) against disclosure of confidential information, under the circumstances of the fact pattern, how can the attorney/mediator comply with the mandate of Disciplinary Rule 8.03(a)? Perhaps by looking at Disciplinary Rule 1.5, which provides, "(c) [a] lawyer may reveal confidential information: . . . (4) [w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law."

The answer to the puzzler thus appears to be linked to the degree of knowledge that the attorney/mediator possesses. If the attorney/mediator knows or "has reason to believe" that a violation of Disciplinary Rule 1.06(b)(1) occurred and that the exception of Disciplinary Rule 1.06(c) does not apply, then the attorney/mediator is required by Disciplinary Rules 8.03(a) and 1.05(c)(4) to inform the disciplinary authorities of the State Bar of Texas. However, in doing so, the attorney/mediator may discover a poor fit between a lawyer's ethical duty to disclose information and a mediator's legal obligation to maintain the same information in absolute confidence.

Brenda T. Cubbage (Dallas):
In response to the puzzler you posed, I have two factual questions. First, did the two clients represented by the attorney have knowledge of the fact that the attorney was representing both of them and that their interests were in direct conflict with each other? Second, had the two clients waived (in writing) any potential conflicts of interest due to such representation? If the attorney fully disclosed the conflicts or potential conflicts to both clients, and the clients had expressly waived such conflicts, then I believe the mediator would have to keep the matter confidential.

However, if the attorney had not fully briefed and disclosed the conflict problems with both clients, then it would seem that the mediator is an attorney licensed by the State of Texas first, and a mediator second. If the scenario presents a clear breach of legal ethics, then I believe even mediators have a responsibility to uphold the ethical duties of attorneys required by the Texas Disciplinary Rules of Professional Conduct.

Greg Bourgeois (Austin): This is a great puzzler because it not only highlights the tension between the attorney's duties as an officer of the court and the mediator's vow of confidentiality, but it also implicitly raises the unspoken concerns we all have about offending our client base.

Let's assume that the mediator in this puzzler has an undisputed duty, as an officer of the court, to report unethical behavior to the State Bar of Texas. How could the mediator handle this situation

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Poetry in Resolution

((Note from the Newsletter Editor: This poem is the first in a series of poetry of or about peace, resolution, mediation, or ADR in general, written by you or written by other authors you have read and would like to share. Please send your poems to Walter Wright at ww05@txstate.edu, with your permission, or the permission of the author, to publish in Alternative Resolutions.)

A Mediator's Prayer

Dear Lord,

As I go forth to help others achieve peace, Use me as an instrument to help the parties define the unexpressed, unify the divided, and decide the undecided.

Permit me to speak less, and listen more, that I might learn from the words of others.

Teach me tolerance, that I might show by example the virtue of patience.

Help me to suspend judgment, that I might maintain my objectivity.

Empower me to encourage them to truly consider the opinions of others, that they might acquire a wider vision of justice

In short, help me Lord, to both represent You, and re-present You in my own actions, that the parties might come to know Your Love, and the virtue of peace and harmony.

John F. Guerra

MEDIATION: A CONTRIBUTION TO THE TRANSFORMATION OF SOCIAL RELATIONSHIPS IN ARGENTINA
continued from page 15

Walter A. Wright *translated this article from Spanish to English, and he accepts full responsibility for any translation errors.*

ENDNOTES

[1] This article contains some of the ideas developed in a book entitled *Mediación Comunitaria: Conflictos en el escenario social urbano* (International Center of Research on Democracy and Social Peace, University of Sonora, Mexico 2005). The authors of the book and this article are the same.

[2] ZIGMUNT BAUMAN, IDENTIDAD: CONVERSACIONES CON BENDETTO VECCHI (Editorial Losada, Buenos Aires 2005).

[3] Martín Hopenhayn, "El reto de las identidades y la multiculturalidad," http://www.comminit.com/la/lacth/sld-3016.html.

[4] JEAN F. SIX, DINÁMICA DE LA MEDIACIÓN, (Editorial Paidós, Buenos Aires 1997).

[5] GIOVANNI SARTORI, LA SOCIEDAD MULTIÉNICA: PLURALISMO, MULTICULTURALISMO Y EXTRANJEROS (Editorial Taurus, Madrid 2001).

[6] Jordi Borja, "Ciudadanía y globalización" (Centro de Documentación en Políticas Sociales, Documentos 29, Gobierno de la Ciudad Autónoma de Buenos Aires 2002).

[7] Nató et al., *supra* note 1.

From left to right:
Gabriela Rodríguez Querejazu, Alejandro Nató, Liliana Carbajal

Advanced Techniques for Breaking Impasse and Bridging Gaps in Mediated Settlements
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technique is most commonly used when the parties reach a bracket in negotiation or mediation but are unable to close the gap through the use of ordinary negotiation techniques. If the parties agree to use this technique, the procedure is as follows: As a last resort, each party confidentially submits a bid to the mediator. For the plaintiff, the bid represents the lowest figure that the plaintiff will accept to settle the case; for the defendant, the bid represents the highest figure the defendant will pay to settle the case. Only the mediator knows both (or all) the figures submitted. By prior agreement, the parties decide what they will do, depending on the outcome. For example, they can agree in advance that if they are X dollars apart, the mediator will disclose the numbers and they will split the difference. They can also agree in advance that if they are only Y dollars apart, the mediator will not disclose the actual figures, but they will continue mediating (or negotiating). Finally they can also agree that if they are more than Z dollars apart, the mediator will not disclose the figures, and they will conclude the mediation. This procedure encourages the parties to submit realistic bids in order to avoid the substantial risks and expense of proceeding to trial

I have used this technique effectively in resolving a multi-million dollar dispute between most of the Native American tribes in the United States and several agencies of the federal government.

I encourage mediators and advocates in mediation to experiment with these two advanced techniques in resolving monetary disputes. They are often very effective in breaking impasse and bridging gaps between settlement offers.

** John W. Cooley is a former U.S. Magistrate and currently serves as a mediator and arbitrator on the JAMS dispute resolution panel in Chicago.*

SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

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SEE PUBLICATION POLICIES ON PAGE 34 AND SEND ARTICLES TO:

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Ethical Puzzler
continued from page 29

without violating that ethical duty or breaching the confidentiality of the mediation? Does one duty trump the other? This puzzler is couched in terms of a completed mediation, which forces the mediator to choose between these competing ethical duties. The mediator may have been able to avoid being in this box by acting before and during the mediation.

In hindsight, this mediator might have avoided this situation by revising his/her discussion of confidentiality in the opening remarks to specifically exclude this situation. Most of the ethical codes applicable to the practice of mediation recognize that in certain instances, applicable law may require the disclosure of information revealed in the mediation process and that the parties may agree to except certain items from confidentiality. Mediators might also avoid this dilemma by amending their "Agreement to Mediate" forms to expressly allow the disclosure of information if the Texas Disciplinary Rules of Professional Conduct require them to disclose it. Of course, it is a little late to amend your forms if you are presented with this situation in the middle of mediation and need to act spontaneously!

In the puzzler, the mediation has ended, but I think that the real lesson is to address this issue in the mediation. If the mediator is in the position to directly address the conflict with the offending attorney, then I would suggest a private caucus with that attorney only. I would raise this issue and point out that the dual representation appears to be a violation of ethics and could subject any mediated settlement agreement to challenge. If, after that discussion, I were still convinced that the lawyer was committing an ethical violation, I would recess the mediation until the situation could be rectified. If it were necessary to end the mediation in a manner that did not reveal the ethical violation to the other party, I would simply refund the mediation fee and state that a conflict was discovered that required me to recuse myself.

Comment:

This was one of the most challenging Ethical Puzzlers yet, and the Panel did an excellent job of defining and addressing the issues. It seems to be gilding the lily to say more, but in the future I, for one, will address the issue (along with other exceptions to confidentiality) in my documents and in my opening remarks.

* ***Suzanne Mann Duvall*** *is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, trainer, and lecturer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for Outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediation Credentialing Association. She is a former chair of the ADR Section of the State Bar of Texas.*

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Binding Arbitration Training; *Houston*; May 25-26, Thursday-Friday; 9 a.m.- 6 p.m.; Worklife Institute; Trainer Kimberly D. Lawrence; for more information call ***713-266-2456***; www.worklifeinstitute.com

40-Hour Basic Mediation ★ *Houston* ★ May 30-31 & June 1-4, 2006 ★ *University of Houston AA White Dispute Resolution Center* ★ For more information call 713.743.2066 or rpietsch@central.uh.edu or www.law.uh.edu/blakely/aawhite

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Family and Divorce Mediation Training; *Houston*; July 12-15, 2006; Wednesday - Saturday, 9 a.m.- 6 p.m.; Worklife Institute; Trainers Diana C. Dale, Elizabeth F. Burleigh; for more information call ***713-266-2456***; www.worklifeinstitute.com

Resolving Public Policy Conflicts and Managing Contention in Public Hearings ★ Austin ★ July 19-21, **2006 ★ *Center for Public Policy Dispute Resolution - The University of Texas School of Law*★** For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

Workplace Conflict Resolution: *Houston*; **July 20-22, 2006**; Thursday - Saturday, 9 a.m.- 6 p.m.; **Worklife Institute**; Trainers Diana C. Dale, Elizabeth F. Burleigh; for more information call ***713-266-2456***; www.worklifeinstitute.com

Mindfulness for Dispute Resolvers: Mediators, Lawyers, Managers, and Negotiators ★ Austin ★ July 27-29, **2006 ★ *Center for Public Policy Dispute Resolution - The University of Texas School of Law*★** For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

International Commercial Arbitration ★ Houston ★ August 15-19, 2006 ★ *University of Houston AA White Dispute Resolution Center* ★ For more information call 713.743.2066 or rpietsch@central.uh.edu or www.law.uh.edu/blakely/aawhite

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Conflict Resolution ★ Denton ★ October 12-15, 2006 ★ ★ *Texas Woman's University* ★ For more information call 940.898.3466 or www.twu.edu/lifelong

NEW YORK STOCK EXCHANGE SEEKS ARBITRATORS

The New York Stock Exchange (NYSE) has asked the ADR Section to advise its members that NYSE is seeking applications from arbitrators. Applicants must have five years of experience in a chosen profession and attend a securities-related arbitration training course. There is no requirement that NYSE arbitrators be attorneys. Training courses are conducted periodically by NYSE and other self-regulatory organizations like the National Association of Securities Dealers.

Although NYSE is located in New York, it conducts arbitration hearings in approximately forty-six cities throughout the country. In these cities, NYSE appoints arbitrators who live in the immediate and surrounding areas. Arbitration panels consist of three individuals, two with no ties to the securities industry and one from the securities industry. Arbitrators receive an honorarium of $400.00 per day, and the chairperson receives an additional $75.00.

Interested individuals should contact Mr. Robert E. Kreuter, an attorney with NYSE's Arbitration Department, at (212) 656-3728 or rkreuter@nyse.com. For more information, visit NYSE's website at http://www.nyse.com, then click on *Regulation* (left side of the screen). The link for *Dispute Resolution/Arbitration* will appear.

ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ Section Newsletter, *Alternative Resolutions* is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ Valuable information on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

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✓ Truly interdisciplinary in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ Many benefits are provided for the low cost of only $25.00 per year!

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ALTERNATIVE DISPUTE RESOLUTION SECTION
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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2006 to June 2007. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

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ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Walter Wright at ww05@txstate.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Walter Wright, c/o Department of Political Science, Texas State University, 601 University Drive, San Marcos, Texas 78666.
8. Each author should send his or her photo (in jpeg format) with the article.
9. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.
2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.
2. Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website address or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2006, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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